No. 15-420

Title:	United States, Petitioner v. Michael Bryant, Jr.
Docketed:	October 5, 2015
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-30177)
Decision Date:	September 30, 2014
Rehearing Denied:	July 6, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Oct 5 2015	Petition for a writ of certiorari filed. (Response due November 4, 2015)
Nov 4 2015	Brief amicus curiae of National Congress of American Indians filed.
Nov 4 2015	Brief of respondent Michael Bryant, Jr. in opposition filed.
Nov 4 2015	Motion for leave to proceed in forma pauperis filed by respondent Michael Bryant, Jr.
Nov 23 2015	DISTRIBUTED for Conference of December 11, 2015.
Nov 23 2015	Reply of petitioner United States filed. (Distributed)
Dec 14 2015	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Dec 14 2015	Petition GRANTED.
Jan 28 2016	Joint appendix filed. (Statement of cost filed.)
Jan 28 2016	Brief of petitioner United States filed.
Feb 4 2016	Brief amici curiae of National Indigenous Women's Resource Center, et al. filed.
Feb 4 2016	Brief amicus curiae of National Congress of American Indians filed.
Feb 4 2016	Brief amici curiae of Dennis K. Burke, United States Attorney, District of Arizona, et al. filed.
Feb 19 2016	The time to file respondent's brief on the merits is extended to and including March 7, 2016.
Mar 4 2016	SET FOR ARGUMENT ON Tuesday, April 19, 2016
Mar 7 2016	Brief of respondent Michael Bryant, Jr. filed.
Mar 14 2016	Brief amici curiae of Criminal Justice Organizations and Scholars filed. (Distributed)
Mar 14 2016	Brief amici curiae of Professor Barbara Creel, and The Tribal Defender Network filed. (Distributed)
Mar 14 2016	Brief amici curiae of The National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Mar 14 2016	Brief amicus curiae of Citizens Equal Rights Foundation filed. (Distributed)
Mar 14 2016	Record requested from U.S.C.A. 9th Circuit.
Mar 15 2016	CIRCULATED.
Mar 15 2016	The record from U.S.D.C. District of Montana is electronic and located on PACER, with the exception of one document.

Mar 23 2016	The record from the U.S.C.A. is electronic and located on PACER.
Apr 6 2016	Reply of petitioner United States filed. (Distributed)
Apr 19 2016	Argued. For petitioner: Elizabeth B. Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Steven C. Babcock, Assistant Federal Defender, Billings, Mont.
Jun 13 2016	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion.
Jun 30 2016	Letter from the United States received.
Jul 15 2016	JUDGMENT ISSUED

15-420

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 117(a) of Title 18, United States Code, makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic-violence offenses. 18 U.S.C. 117(a).

The question presented is whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was appellee in the court of appeals. Respondent is Michael Bryant Jr., who was appellant in the court of appeals.

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No.

UNITED STATES OF AMERICA, PETITIONER

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MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 769 F.3d 671. The oral ruling of the district court denying respondent's motion to dismiss (App., *infra*, 32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2014. A petition for rehearing was denied on July 6, 2015 (App., *infra*, 33a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this petition. App., *infra*, 55a-64a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Montana, respondent was convicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). App., *infra*, 3a. The district court sentenced respondent to 46 months of imprisonment, to be followed by three years of supervised release. D. Ct. Doc. 34, at 2-3 (May 9, 2012) (Judgment). The court of appeals reversed the convictions and directed that the charges against respondent be dismissed because, the court held, the Constitution prohibited reliance on respondent's valid uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. App., *infra*, 1a-16a.

1. When an Indian Tribe criminally prosecutes an Indian in tribal court, it exercises its own sovereign authority and is not governed by provisions of the federal Constitution. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Although "the Bill of Rights does not apply to Indian tribal governments," *Duro* v. *Reina*, 495 U.S. 676, 693 (1990), Congress conferred a range of procedural safeguards on tribal-court defendants in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.* Under ICRA, a tribal-court defendant is guaranteed due process of law and has the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to

have compulsory process for obtaining witnesses in his favor. 25 U.S.C. 1302(a)(6) and (8). A tribal-court defendant accused of an offense punishable by imprisonment is entitled to a jury trial. 25 U.S.C. 1302(a)(10). ICRA also provides protection from unreasonable searches and seizures, compelled self-incrimination, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2), (3), (4), and (7). In addition, tribal-court defendants may seek habeas corpus review of their convictions in a federal district court. 25 U.S.C. 1303.

At the time of respondent's tribal-court convictions, ICRA provided that tribal courts could not impose a prison term greater than one year for any criminal offense and specified that a defendant had the right to the assistance of counsel at his own expense. 25 U.S.C. 1302(6) and (7) (2006).[1] ICRA's counsel provision thus differs from the Sixth Amendment. While the Sixth Amendment provides no right to appointed counsel in misdemeanor cases where only a fine is imposed, it does provide a right to appointed counsel to an indigent defendant in a misdemeanor prosecution that results in actual imprisonment. *Scott* v. *Illinois*, 440 U.S. 367, 369, 373-374 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

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[1] The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Tit. II, 124 Stat. 2261, amended ICRA to provide that tribal courts may impose sentences of up to three years of imprisonment for any one offense. *Id.* § 234, 124 Stat. 2279. An indigent defendant must be provided with appointed counsel before a sentence of more than one year of imprisonment is imposed. *Ibid.*; see 25 U.S.C. 1302(c)(2).

2. a. Respondent, who is an enrolled member of the Northern Cheyenne Tribe, has numerous tribal-court misdemeanor convictions for domestic assault. App., *infra*, 3a; Presentence Investigation Report (PSR) ¶ 81. Specifically, respondent pleaded guilty on multiple occasions in the Northern Cheyenne Tribal Court to committing domestic abuse. See *ibid.* In 1999, for example, respondent assaulted his live-in girlfriend by strangling her and hitting her on the head with a beer bottle. *Ibid.* In 2007, respondent kneed his girlfriend in the face and struck her with his fist. *Ibid.* The Northern Cheyenne Tribal Court sentenced respondent to various terms of imprisonment for his offenses, never exceeding one year of incarceration. See *ibid.* Respondent did not seek federal habeas corpus review of any of his domestic-violence convictions.

Respondent has alleged, and the courts below have assumed, that he was indigent and that he did not have access to appointed counsel at the time of his tribal-court convictions. See App, *infra*, 5a & n.4. It is undisputed, however, that those convictions are valid and were obtained in compliance with ICRA. *Id.* at 7a-8a, 46a.

b. Respondent's pattern of domestic violence continued in 2011 with assaults on two different victims. In February 2011, respondent attacked his live-in girlfriend by dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. D. Ct. Doc. 29, at 2-3 (Jan. 12, 2012) (Offer of Proof). Three months later, in May 2011, respondent assaulted a different woman who was living with him. *Ibid.* Respondent woke her by yelling at her and then choked her until she almost passed out. *Ibid.* Based on that

conduct, respondent was indicted in the United States District Court for the District of Montana on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). D. Ct. Doc. 9, at 2 (June 20, 2011) (Indictment).

c. Respondent filed a motion to dismiss the indictment, alleging that it would violate the Fifth and Sixth Amendments to use his uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element. D. Ct. Doc. 19, at 1-2 (Nov. 7, 2011) (Motion to Dismiss). The district court denied the motion to dismiss. App., *infra*, 32a.

d. Respondent pleaded guilty to both counts in the indictment, reserving his right to appeal the denial of his motion to dismiss. D. Ct. Doc. 27, at 2-3 (Jan. 10, 2012) (Conditional Plea Agreement). The district court sentenced respondent to concurrent terms of 46 months of imprisonment on each count, to be followed by three years of supervised release. Judgment 2-3.

3. a. The court of appeals reversed respondent's convictions, holding that the indictment must be dismissed because its reliance on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element violated the Constitution. App., *infra*, 1a-16a.

The court of appeals acknowledged that respondent's uncounseled tribal-court convictions were not constitutionally infirm because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." App., *infra*, 7a-8a. The court observed, however, that respondent's convictions "would have violated the Sixth Amendment had they been obtained in state or federal court" because respondent was incarcerated for his tribal offenses and "indigent

criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed." *Id.* at 8a. The court of appeals concluded that it was "constitutionally impermissible" to use respondent's uncounseled tribal-court convictions to establish the predicate-offense element in his Section 117(a) prosecution because the tribal court had not "guarantee[d] a right to counsel that is * * * coextensive with the Sixth Amendment right." *Id.* at 12a.

In reaching that conclusion, the court of appeals relied heavily on its prior decision in *United States* v. *Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which held that it was impermissible to use an uncounseled tribal-court guilty plea that resulted in imprisonment as evidence in a later federal prosecution arising out of the same incident. App., *infra*, 10a-11a. The court rejected the suggestion that *Ant* had been effectively overruled by this Court's decision in *Nichols* v. *United States*, 511 U.S. 738 (1994), which held that an uncounseled state misdemeanor conviction that did not result in imprisonment could be used to enhance a sentence for a subsequent offense, *id.* at 746-747. App., *infra*, 12a-13a. In the court's view, "*Nichols* and *Ant* are easily reconcilable because *Nichols* involved an uncounseled conviction [that was] valid under the Sixth Amendment" because no imprisonment was imposed, "whereas *Ant* involved prior tribal court proceedings that, in state or federal court, would not have been valid under the Sixth Amendment." *Id.* at 13a.

The court of appeals recognized that, in holding that the charges against respondent must be dismissed, it had created a "conflict with two other circuits," both of which had "held that a prior uncoun-

seled tribal court conviction could be used as a predicate offense for a [Section] 117(a) prosecution." App., *infra*, 14a (citing *United States* v. *Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), and *United States* v. *Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012)). The court disagreed with those decisions, believing that they could not "be reconciled with *Ant*." *Id.* at 15a.

b. Judge Watford concurred. App., *infra*, 16a-21a. He agreed that *Ant* "control[led] the outcome of" respondent's case, but he wrote separately to explain why "*Ant* warrants reexamination." *Id.* at 16a-17a. As Judge Watford observed, "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Id.* at 17a. Judge Watford found it "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." *Id.* at 17a-18a.

Judge Watford also explained that *Nichols* had "undermin[ed] the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." App., *infra*, 17a. And in Judge Watford's view, "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that uncounseled "tribal court convictions are inherently suspect and unworthy of the federal courts' respect." *Id.* at 20a.

Finally, Judge Watford observed that the Eighth and Tenth Circuits had "pointedly disagreed" with *Ant* when holding that uncounseled tribal court convictions may serve as predicate offenses in a Section 117(a) prosecution. App., *infra*, 20a. "Given this circuit split and the lack of clarity in this area of Sixth Amendment law," Judge Watford believed that "the Supreme Court's intervention seems warranted." *Id.* at 21a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order, with eight judges dissenting. App., *infra*, 33a-54a.[2]

a. Judge Paez, who authored the panel opinion, concurred in the denial of rehearing in an opinion joined by Judge Pregerson, who was also a member of the panel. App., *infra*, 34a-39a. "[W]hile recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*," Judge Paez continued to adhere to the view that *Nichols* should not be read to "permit[] the use of [respondent's] convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do)." *Id.* at 34a-35a. "[G]iven the sharp division over the important issues at stake in this case," Judge Paez recognized that "Supreme Court review may be unavoidable." *Id.* at 39a.

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[2] When the court of appeals issued its mandate following its denial of rehearing, respondent had finished serving his term of imprisonment and was subject to a three-year term of supervised release. Respondent's completion of his term of incarceration does not moot appellate proceedings seeking to reinstate his convictions and his term of supervised release. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (per curiam).

b. Judge Owens, joined by Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, and M. Smith, dissented from the denial of rehearing en banc. App., *infra*, 40a-43a. Noting that Congress had enacted Section 117(a) to address "the grave problem of domestic violence on tribal lands," Judge Owens criticized the panel for "wip[ing] this important statute off the books." *Id.* at 40a-41a. Judge Owens further noted the panel's acknowledgment that its decision created a circuit split by explicitly disagreeing with the Eighth and Tenth Circuits on whether the Constitution permits the use of uncounseled tribal-court convictions to prove a defendant's status as a habitual offender in a Section 117(a) prosecution. *Id.* at 41a. That holding, Judge Owens emphasized, tears "a massive gap in the fragile network that protects tribal women and their children from generations of abuse." *Ibid.* Judge Owens also pointed out that the decision parted ways with circuits that treat uncounseled misdemeanor convictions as valid even if a sentence of imprisonment is not. *Id.* at 42a. Judge Owens concluded by observing that "only the Supreme Court can rectify this terrible situation." *Ibid.* He "urge[d] the Court to do so as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a.

c. Judge O'Scannlain, joined by Judges Gould, Tallman, Bybee, Callahan, Bea, M. Smith, and Owens, authored a separate dissent. App., *infra*, 44a-54a. Judge O'Scannlain explained that the panel's decision "contravenes the Supreme Court's decision in *Nichols* v. *United States*, stands in direct conflict with the only two other circuit courts to consider the issue presented, and, ultimately, holds tribal courts in contempt for

having the audacity to follow the law as it is, rather than the law as we think it should be." *Id.* at 45a (citation omitted). As Judge O'Scannlain observed, "[b]oth Nichols's and [respondent's] uncounseled convictions comport with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a (citation and internal quotation marks omitted). Judge O'Scannlain deemed it irrelevant that "the prior tribal court proceedings *would* have violated the Sixth Amendment *if* they were in state or federal court" because "using a federal recidivist statute to prosecute [respondent] does not transform his prior, valid, tribal court convictions into new, invalid, federal ones." *Ibid.* (citation and internal quotation marks omitted).

Judge O'Scannlain concluded that the panel's opinion "must rest on an assumption that tribal court convictions are inherently unreliable," which "trample[s] upon the principles of comity and respect that undergird federal court recognition of tribal court judgments." App., *infra*, 52a (emphasis omitted). The panel's decision, he emphasized, "cries out for [Supreme Court] review." *Id.* at 45a; see *ibid.* (observing that "*every member of the panel* has acknowledged that this case requires the Supreme Court's attention").

REASONS FOR GRANTING THE PETITION

The court of appeals held that the federal domestic-violence recidivist provision, 18 U.S.C. 117(a), is unconstitutional as applied to repeat offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. That holding is incorrect, in conflict with other circuits, and highly damag-

ing to federal prosecutorial efforts to combat the serious problem of domestic violence in Indian country.

The court of appeals premised its decision on a decades-old circuit precedent that relied on precedent from this Court that was later overruled. The court's bar against the use of valid, but uncounseled, tribal-court convictions in subsequent federal proceedings cannot be reconciled with this Court's decisions upholding the subsequent use of prior valid, but uncounseled, convictions to support recidivist punishment. The Ninth Circuit's decision also conflicts with the decisions of the two other courts of appeals that have addressed the identical issue and have upheld Section 117(a). The court's decision will impede the effective and uniform enforcement of Section 117(a) by hamstringing the prosecution of recidivist offenders like respondent, who have lengthy records of domestic assault in tribal court but have previously avoided felony-level punishment for their violence. As recognized by all members of the court of appeals panel, and eight judges who dissented from rehearing en banc, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Section 117(a) Is Unconstitutional As Applied To Habitual Offenders With Valid Uncounseled Tribal-Court Misdemeanor Convictions

Congress enacted 18 U.S.C. 117 in part "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. No. 109-162, § 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg-10 note). For that purpose, Congress authorized prosecution of repeat of-

fenders who commit a domestic assault in Indian country and provided that prior convictions for domestic assaults in "Indian tribal court proceedings" can serve as predicate offenses in a Section 117(a) prosecution. 18 U.S.C. 117(a). Contrary to the Ninth Circuit's decision in this case, nothing in the Constitution prohibits Congress's judgment that prior tribal-court misdemeanor convictions, whether or not they were counseled and whether or not they resulted in imprisonment, support a recidivist prosecution under Section 117(a).

1. The Sixth Amendment does not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

This Court's precedents demonstrate that a prior conviction that did not violate the Sixth Amendment when it was imposed also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding. Because respondent's tribal-court convictions were validly entered in accordance with tribal and federal law, the court of appeals erred in holding that the Sixth Amendment prohibited their use in his Section 117(a) prosecution.

a. After this Court held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that the Constitution guarantees indigent state defendants the right to appointed counsel in a felony case, the Court addressed whether uncounseled convictions that violated *Gideon* may be used in subsequent proceedings. In *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), the Court held that they may not. The Court reasoned that if the government could exploit the *Gideon* "defect in the prior conviction" by

using that conviction in a later prosecution, it would cause the defendant to "suffer[] anew from the deprivation of [his] Sixth Amendment right." *Ibid.* In addition, the Court concluded, reliance on an invalid conviction would "erode the principle" of *Gideon*. *Ibid.*

The corollary of those principles is that a conviction that is constitutionally valid despite the absence of counsel may be used in a later proceeding without violating the Sixth Amendment. The use of a valid conviction neither exacerbates a prior constitutional violation nor undermines this Court's case law concerning the right to counsel.

In *Nichols* v. *United States*, 511 U.S. 738 (1994), the Court made those principles clear. In that case, the Court held that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment (because no term of imprisonment was imposed) could be relied upon to enhance a defendant's sentence for a later offense. *Id.* at 748-749. In so holding, *Nichols* overruled *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), in which a majority of a fractured Court, which could not agree on a rationale, had ruled that a prior uncounseled misdemeanor conviction that was valid for its own purposes could not be used to establish a defendant's recidivist status in a subsequent prosecution. 511 U.S. at 748.

Nichols noted that "the Sixth Amendment right to counsel did not obtain" in the prior prosecution because the defendant was fined but not incarcerated. 511 U.S. at 740, 746 (citing *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979)). The "logical consequence," the Court explained, was that the valid uncounseled prior conviction could be used to increase the sentence for a

subsequent offense, "even though that sentence entails imprisonment." *Id.* at 746-747. "Enhancement statutes," the Court reasoned, "whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction"; instead, the Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* at 747 (internal quotation marks omitted) (citing *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962)). Thus, the Court held that, "consistent with the Sixth and Fourteenth Amendments of the Constitution, * * * an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748-749.

Nichols demonstrates that the Sixth Amendment does not preclude relying on a valid, uncounseled tribal-court conviction in a Section 117(a) prosecution for recidivist domestic violence. Because the "Bill of Rights does not apply to Indian tribes" when they act in their sovereign capacity to prosecute their own members, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), "the Sixth Amendment right to counsel d[oes] not obtain" in those proceedings, *Nichols*, 511 U.S. at 746. The use of the tribal-court conviction in a Section 117(a) proceeding accordingly does not inflict harm based on a prior constitutional violation, because no "defect in the prior conviction" exists. *Burgett*, 389 U.S. at 115. Nor does the use of an uncounseled tribal-court misdemeanor conviction in a subsequent prosecution "erode

the principle[s]" articulated in this Court's decisions interpreting the Sixth Amendment right to counsel. *Ibid.* Because those decisions recognize a misdemeanor conviction as valid when rendered in tribal court, even if the defendant was not counseled, no principle in this Court's jurisprudence is undermined.

It would be particularly anomalous to bar the use of a valid but uncounseled tribal court misdemeanor conviction simply because imprisonment was imposed; the Sixth Amendment, even when it applies, does not bar the entry of the *conviction* itself, but only the imprisonment sentence. Accordingly, "[t]he appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself." *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); see also *Iowa* v. *Tovar*, 541 U.S. 77, 88 n.10 (2004) (reserving judgment on this issue). Respondent should not be protected against the use of his tribal criminal record based on the sentence he received in tribal court, when that sentence has no relevance to the use of the conviction as a predicate under Section 117(a).

b. The court of appeals relied primarily on its decision in *United States* v. *Ant*, 882 F.2d 1389, 1394-1395 (9th Cir. 1989), which had relied on *Baldasar* in concluding that an uncounseled tribal guilty plea that resulted in imprisonment could not be used as evidence in a later federal prosecution for the same conduct. App., *infra*, 12a, 15a ("we are bound by *Ant*"), 16a ("we reiterate *Ant*'s continued vitality"). But *Nichols* overruled *Baldasar* and thus abrogated *Ant*'s rationale. The court of appeals' attempt to rehabilitate *Ant* fails. The court purported to distinguish *Nichols* on the ground that it "involved a prior conviction that

did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." *Id.* at 12a (citation omitted). But as Judge O'Scannlain observed, "the court's argument is illogical" because "[b]oth Nichols's and [respondent's] uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a.

In sum, nothing in this Court's Sixth Amendment cases supports barring the use of a valid tribal-court conviction because it would have triggered different constitutional protections had it been rendered in a different court. And nothing in logic supports allowing the government to rely on a tribal-court misdemeanor conviction when the tribal court imposed only a fine, but barring it from using the same conviction if the tribal court imposed imprisonment, when nothing in the federal recidivist prosecution turns on the sentence received in tribal court.

2. Due process principles do not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

Although the panel did not ground its decision in the Due Process Clause or concerns about reliability, an opinion concurring in the denial of rehearing suggested that tribal-court convictions do not "pass[] muster at the guilt phase" because of "reliability concerns" See App., *infra*, 36a (Paez, J., concurring in the denial of rehearing en banc). That suggestion is unfounded. Congress's decision to make a tribal misdemeanor conviction an element of a recidivist

domestic-violence crime satisfies due process if it is "rational[]," *Lewis* v. *United States*, 445 U.S. 55, 65 (1980), and Section 117(a) readily passes that test.

a. This Court's decision in *Scott* upheld the constitutional validity of an uncounseled misdemeanor conviction in state and federal court so long as imprisonment was not imposed. If such a conviction does not raise due process reliability concerns, Congress could rationally conclude that reliance on an uncounseled tribal misdemeanor conviction, whether or not imprisonment was imposed, similarly does not raise due process reliability concerns, because the fact of the misdemeanor domestic-violence conviction, not the tribal-court sentence, is the relevant consideration under Section 117(a).

Nichols further establishes that Congress acted rationally in deeming uncounseled tribal-court convictions sufficiently reliable to serve as predicate offenses in a Section 117(a) prosecution. The Court in *Nichols* recognized the argument—pressed by three Justices in *Baldasar* and the dissenting opinion in *Nichols* itself—that "an uncounseled misdemeanor conviction is 'not sufficiently reliable' to support imprisonment" and "'does not become more reliable merely because the accused has been validly convicted of a subsequent offense.'" 511 U.S. at 744 (quoting *Baldasar*, 446 U.S. at 227-228) (opinion of Marshall, J.); *id.* at 757-758 (Blackmun, J., dissenting) (expressing the view that "prior uncounseled misdemeanor conviction[s]" are not "sufficiently reliable to justify additional jail time imposed under an enhancement statute"). But the Court overruled *Baldasar* and permitted an uncounseled misdemeanor conviction to trigger a sentencing enhancement. The *Nichols* Court

thus necessarily rejected the claim that those convictions, though uncounseled, are so unreliable as to violate due process when used to support imprisonment in a later proceeding.

Judge Paez believed that *Nichols* could be distinguished because it "is a sentencing case." App., *infra*, 35a. *Nichols* did observe that "[r]eliance on [an uncounseled misdemeanor] conviction is * * * consistent with the traditional understanding of the sentencing process, which [the Court] ha[s] often recognized as less exacting than the process of establishing guilt." 511 U.S. at 747. But whether a prior conviction is used to enhance a sentence or to satisfy a predicate-offense element, Congress could rationally conclude that the conviction represents a sufficiently reliable indicator of prior criminal conduct. In both contexts, the government is entitled to rely on the fact of the prior conviction and need not relitigate whether the underlying conduct occurred. While the government must establish the fact of the prior conviction beyond a reasonable doubt in a Section 117(a) prosecution, that procedural difference does not alter the substantive use of the conviction to demonstrate that the defendant is a repeat offender.

b. Although the Bill of Rights does not apply to tribal governments, Congress has exercised its power to provide an array of protections to promote the reliability of tribal-court criminal proceedings through ICRA. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 57-58 & n.8 (1978). A "central purpose" of ICRA was "to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Id.* at 61

(quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

ICRA's counsel provision does diverge from the Sixth Amendment, but Congress could rationally conclude that appointed counsel is not essential to an accurate determination of guilt in tribal-court misdemeanor proceedings, particularly in light of the other procedural protections that help ensure the reliability of tribal-court convictions. ICRA guarantees that a tribal-court defendant will not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(a)(8). A defendant accused of an offense punishable by imprisonment has the right to a jury trial, and ICRA further grants a defendant "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. 1302(a)(6) and (10). In addition, tribal-court defendants are empowered to seek habeas corpus review of their convictions in federal court. 25 U.S.C. 1303. Congress accordingly had a rational basis to criminalize a third act of domestic violence by a habitual offender with two valid tribal-court convictions.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Ninth Circuit's holding that Section 117(a) is unconstitutional as applied to habitual offenders with uncounseled tribal-court convictions resulting in imprisonment conflicts with the published decisions of two other courts of appeals. App., *infra*, 14a. In square conflict with the decision below, the Eighth

and Tenth Circuits have held that it does not violate the Constitution to rely on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element.

In *United States* v. *Cavanaugh*, 643 F.3d 592 (2011), cert. denied, 132 S. Ct. 1542 (2012), the Eighth Circuit held that the Constitution did not "preclude use of" an uncounseled tribal-court conviction in a Section 117(a) prosecution "merely because [the conviction] *would have been* invalid had it arisen from a state or federal court." *Id.* at 604. Like respondent, the defendant in *Cavanaugh* had multiple uncounseled tribal-court convictions for domestic violence that had resulted in incarceration. See *id.* at 593-594 & n.1. Also like respondent, the defendant in *Cavanaugh* "alleg[d] no irregularities with his tribal-court proceedings other than the denial of counsel (which was not a violation of any tribal or federal law)." *Id.* at 603 n.7. Relying on *Nichols*, the Eighth Circuit rejected the defendant's argument that it would violate the Constitution to use his uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. See *id.* at 603-604. "[N]ot only did *Nichols* reject the theory that some portion of a subsequent punishment could be viewed as having been 'caused' by a prior conviction," the Eighth Circuit explained, but "the majority in *Nichols* [also] appears to have rejected * * * arguments based on concerns about prior convictions' reliability." *Id.* at 600. Accordingly, the Eighth Circuit held that "predicate [tribal-court] convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of [Section] 117." *Id.* at 594.

The Tenth Circuit reached the same conclusion in *United States* v. *Shavanaux*, 647 F.3d 993 (2011), cert. denied, 132 S. Ct. 1742 (2012). The court observed that the defendant's uncounseled tribal-court domestic-violence convictions did not violate the Sixth Amendment "[b]ecause the Bill of Rights does not constrain Indian tribes." *Id.* at 997. Thus, the use of those convictions "in a subsequent prosecution c[ould] not violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance." *Id.* at 997-998 (citation omitted) (quoting *Burgett*, 389 U.S. at 115). The court further held that the Due Process Clause did not prohibit the use of uncounseled tribal-court convictions in a Section 117(a) proceeding. *Id.* at 998-1001. The court emphasized that tribal-court convictions must be "obtained in compliance with ICRA," which rendered them "compatible with due process of law." *Id.* at 1000. Therefore, under "principles of comity," federal courts in Section 117(a) proceedings do not violate the Constitution when they rely on valid tribal-court convictions as predicate offenses. *Id.* at 1001; see *id.* at 1000 (noting that courts may credit foreign convictions obtained "through means that deviate from our constitutional protections" so long as they "comport[] with our notion of fundamental fairness") (internal quotation marks omitted).

In the decision below, the court of appeals acknowledged that its "holding place[d] [it] in conflict with" the Eighth and Tenth Circuits. App., *infra*, 14a; see *id.* at 21a (Watford, J., concurring) (noting the "circuit split"). Judge Owens and Judge O'Scannlain likewise emphasized the division among the circuits in their dissents from the denial of rehearing en banc. See *id.*

at 41a (Owens, J.) (lamenting "the split [the panel's decision] creates with the Eighth and Tenth Circuits," which "has torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse"); *id.* at 54a (O'Scannlain, J.) (observing that the panel's decision "creates a circuit split by disagreeing with all other circuit courts which have addressed the very issue presented").

The United States opposed certiorari in *Cavanaugh* and *Shavanaux*, reasoning that those decisions did not squarely conflict with the Ninth Circuit's decision in *Ant*, which was in any event of "doubtful continuing validity because it was decided before *Nichols* overruled *Baldasar*." Br. in Opp. 14, *Shavanaux*, *supra* (No. 11-7731) (explaining that review would be premature because "the Ninth Circuit may well reconsider its holding [in *Ant*] if the opportunity arises"). Now that the Ninth Circuit has affirmed "*Ant's* continued vitality" and relied on that decision to create a square conflict on the constitutionality of Section 117(a) as applied to habitual offenders with uncounseled tribal-court convictions, an intractable division of authority exists. App., *infra*, at 16a.

That conflict alone warrants review. But the Ninth Circuit's decision also creates serious tension with a line of cases holding that an uncounseled misdemeanor conviction may be used in a subsequent proceeding, even if a term of imprisonment was impermissibly imposed, because it is the sentence of imprisonment that violates *Scott*, not the underlying adjudication of guilt. Several courts have held that the remedy for a *Scott* violation is to vacate the imprisonment sentence, but

affirm the conviction.[3] See, *e.g.*, *United States* v. *Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (striking sentence of imprisonment imposed on uncounseled misdemeanant, but affirming his conviction and fine); *United States* v. *White*, 529 F.2d 1390, 1391, 1394 (8th Cir. 1976) (same); *Alabama* v. *Shelton*, 851 So. 2d 96, 102 (Ala. 2000) (same), aff'd, 535 U.S. 654 (2002); but see *United States* v. *Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (stating in dicta without analysis that "if an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional"). And three courts of appeals have held that an uncounseled misdemeanor conviction may be counted in a defendant's criminal history at sentencing for a subsequent offense, even if the defendant was impermissibly sentenced to a term of imprisonment in the prior proceeding. See *United States* v. *Acuna-Reyna*, 677 F.3d 1282, 1284-1285 (11th Cir.), cert. denied, 133 S. Ct. 342 (2012); *United States* v. *Jackson*, 493 F.3d 1179, 1183-1184 (10th Cir. 2007); *Ortega*, 94 F.3d at 769-770. As Judge Owens observed, "[b]y holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the panel splits with every circuit to seriously consider this issue." App., *infra*, 41a.

C. The Question Presented Is Significant And Warrants This Court's Review

The Ninth Circuit's invalidation of 18 U.S.C. 117 as applied in this case, and its creation of a circuit conflict on that issue, warrants this Court's review. Section 117(a) serves a vital function in addressing the

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[3] This Court noted but reserved this question in *Iowa* v. *Tovar*, 541 U.S. at 88 n.10.

"grave problem of domestic violence on tribal lands." App., *infra*, 40a (Owens, J., dissenting from denial of rehearing en banc). The Ninth Circuit's ruling substantially limits the government's ability to "remove these recidivists from the communities that they repeatedly terrorize." *Id.* at 41a. Because the court's decision frustrates Congress's goal in enacting Section 117(a) and detrimentally affects the administration of the federal criminal justice system, this Court's review is warranted. Moreover, the circuit conflict on this issue has considerable practical significance because tribal lands are particularly concentrated in the three jurisdictions that have considered the question presented. Of the 567 federally recognized tribes, more than 500 are located in the Eighth, Ninth, and Tenth Circuits.[4] This Court should grant certiorari to ensure that habitual domestic-violence offenders with tribal-court convictions are treated the same way under Section 117(a) no matter where they reside.

Domestic violence against Indians is a pressing problem of alarming magnitude. More than forty percent of Indians have been victims of physical violence, rape, or stalking by an intimate partner in their lifetimes. See Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3, 39-40 & tbls. 4.3 and 4.4 (Nov. 2011), http://www.cdc.gov/ViolencePrevention/pdf/NISVSReport2010-a.pdf. Moreover, recidivism represents a severe threat because "[d]omestic violence often escalates in severity over time." *United States* v. *Castleman*, 134 S. Ct. 1405, 1408 (2014). In

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[4] See 80 Fed. Reg. 1942 (Jan. 14. 2015); 80 Fed. Reg. 39,144 (July 8, 2015).

legislative findings accompanying Section 117, Congress found that "during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances." VAWA Reauthorization Act § 901(4), 119 Stat. 3077 (42 U.S.C. 3796gg-10 note).

Before Section 117's enactment, Indian habitual offenders who committed repeated acts of domestic violence on tribal lands frequently escaped felony-level punishment. The federal government generally could not prosecute those recidivist offenders unless their violence caused death or serious bodily injury and so rose to the level of a major crime. See 18 U.S.C. 1152, 1153. Most States have no criminal jurisdiction over crimes involving Indians in Indian country, and those that do often face funding constraints that substantially limit their efforts to combat crime on tribal land. See Sarah Deer et al., Tribal Law and Pol'y Inst., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7-8 (2007), http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf; see also *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-474 (1979) (summarizing jurisdiction of States over crimes occurring on tribal land). And at the time Congress enacted Section 117, ICRA precluded the tribes themselves from imposing felony punishment on repeat offenders. See 25 U.S.C. 1302(7) (2006) (preventing tribal courts from imposing "punishment greater than imprisonment for a term of one year").[5]

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[5] More than four years after Section 117 was enacted, Congress amended ICRA to authorize tribal courts to impose sentences of

In enacting Section 117, Congress recognized the inadequacy of efforts to punish domestic violence on tribal lands and sought to close that gap. Emphasizing that "Indian tribes require additional criminal justice * * * to respond to violent assaults against women," Congress passed Section 117 "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act §§ 901(5), 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg note). Section 117's inclusion of tribal-court domestic-violence convictions as predicate offenses is essential to accomplishing that goal. See 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain introducing bill containing precursor to Section 117) (observing that perpetrators of domestic violence on tribal lands "may escape felony charges until they seriously injure or kill someone" and that Section 117 addresses that problem by "creat[ing] a new Federal offense aimed at the habitual domestic violence offender and allow[ing] tribal court convictions to count for purposes of Federal felony prosecution").

By invalidating Section 117 as applied to recidivist domestic-violence offenders with uncounseled tribal-court convictions that resulted in imprisonment, the court of appeals has "stripped Congress * * * of the power to meaningfully punish" individuals like re-

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up to three years of imprisonment for a single offense, provided the courts comply with additional procedural requirements. 25 U.S.C. 1302(b) and (c). As of August 14, 2015, only ten tribes were relying on that enhanced sentencing authority. See Tribal Law and Policy Institute, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing* (Aug. 14, 2015), http://www.tribal-institute.org/download/VAWA/VAWA ImplementationChart.pdf.

spondent and to "protect their victims from another beating (or worse)." App., *infra*, 42a (Owens, J., dissenting from denial of rehearing en banc). Because the Ninth Circuit has nullified a central application of Section 117, and created disuniformity in the national enforcement of the important statute, this Court should grant review.

Indeed, every member of the panel recognized the need for this Court's intervention. See App., *infra*, 39a (Paez, J., concurring in denial of rehearing en banc) (acknowledging that "Supreme Court review may be unavoidable" in light of "the sharp division over the important issues at stake in this case"); *id.* at 21a (Watford, J., concurring) ("Given th[e] circuit split and the lack of clarity in this area of Sixth Amendment law, the Supreme Court's intervention seems warranted."). The eight judges who dissented from the denial of rehearing en banc likewise emphasized the need for this Court to resolve the issue of Section 117(a)'s constitutionality, "urg[ing] the Court" to intervene "as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a. As one judge concisely stated, the Ninth Circuit's erroneous holding that the Constitution precludes Congress's method for combatting recidivist domestic violence on tribal land is "a decision [that] cries out for [this Court's] review." *Id.* at 45a (O'Scannlain, J., dissenting from denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-30177
D.C. No. 1:11-cr-00070-JDS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BRYANT, JR., DEFENDANT-APPELLANT

Argued and Submitted:
July 10, 2014—Portland, Oregon
Filed: Sept. 30, 2014

OPINION

Appeal from United States District Court
for the District of Montana
Jack D. Shanstrom, Senior District Judge, Presiding

Before: HARRY PREGERSON, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

PAEZ, Circuit Judge:

Michael Bryant, Jr., an Indian, was indicted on two counts of domestic assault by a habitual offender, in

violation of 18 U.S.C. § 117(a).[1] In support of the charges, the government relied on two prior tribal court convictions for domestic abuse. These convictions were uncounseled and at least one resulted in a term of imprisonment. The Sixth Amendment guarantees indigent defendants in state and federal criminal proceedings appointed counsel in any case where a term of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367, 369, 373-74 (1979). But the Sixth Amendment does not apply to tribal court proceedings. *United States v. First*, 731 F.3d 998, 1002 (9th Cir. 2013), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Mar. 20, 2014) (No. 13-9435). In this case, we must decide whether, in a prosecution under § 117(a), the government may use prior tribal court convictions that, although not obtained in violation of the Constitution, do not comport with the Sixth Amendment right to counsel to prove an element of the offense. We hold that *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), prohibits the use of such convictions in a § 117(a) prosecution. We therefore reverse the district court's denial of Bryant's motion to dismiss the indictment.

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[1] Although we are mindful that the term "Native American" or "American Indian" may be preferable, we use the term "Indian" throughout this opinion because that is the term used throughout the United States Code. We also use the term "tribal," as that is the term used in 18 U.S.C. § 117(a).

I. BACKGROUND

In June 2011, Michael Bryant, Jr. was indicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. § 117(a). Section 117(a) criminalizes the commission of "domestic assault within . . . Indian country" by any person "who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction[,] . . . assault . . . against a spouse or intimate partner." Count I charged that in February 2011, Bryant assaulted C.L.O., his previous girlfriend, "after having been convicted of at least two separate prior domestic assaults." Count II charged that in May 2011, Bryant assaulted his new live-in girlfriend, D.E., "after having been convicted of at least two separate prior domestic assaults."[2] The prior domestic assaults the government relied upon were domestic abuse convictions obtained in the Northern Cheyenne Tribal Court.

Bryant filed a motion to dismiss the indictment. He argued that using his tribal court convictions to satisfy an element of § 117(a) violates his Fifth and Sixth Amendment rights because (1) he was not appointed counsel during his tribal court proceedings and (2) only Indians may be prosecuted under § 117(a) on the basis of a prior

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[2] The February 2011 and May 2011 assaults both occurred at Bryant's residence, which was located within the Northern Cheyenne Indian Reservation.

conviction that does not comport with the Sixth Amendment. The government did not contest Bryant's representation that he lacked the assistance of counsel during his prior tribal court proceedings and that his convictions would have violated the Sixth Amendment had they been obtained in state or federal court. The district court denied the motion in a brief oral ruling. Bryant then entered a guilty plea pursuant to a conditional plea agreement that preserved his right to appeal the district court's ruling on the motion to dismiss. The district court sentenced Bryant to forty-six months' imprisonment on each count, to run concurrently.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review a final judgment of the district court pursuant to 28 U.S.C. § 1291. We review de novo a district court's denial of a motion to dismiss an indictment on constitutional grounds. *United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013); *United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008).

III. DISCUSSION

Bryant argues that using his prior tribal court convictions as the predicate offenses in a § 117(a) prosecution violates the Sixth Amendment right to counsel and the Fifth Amendment guarantee of due process because these convictions were obtained through procedures that, if utilized in state or federal court, would violate the Sixth Amendment. As an initial matter, the government argues that Bryant failed to make an evidentiary showing

that his tribal court convictions were uncounseled. The government also argues that tribal court proceedings are not governed by the Sixth Amendment and convictions that were not obtained in actual violation of the Constitution may be used in subsequent prosecutions.[3]

We may easily dispose of the government's first argument. In district court, Bryant repeatedly represented that he lacked counsel during the relevant tribal court proceedings. Yet, the government never objected that Bryant had not met his evidentiary burden on this point, even when Bryant characterized the issue as "undisputed." Accordingly, the issue is waived, *United States v. Carlson*, 900 F.2d 1346, 1349-50 (9th Cir. 1990), and we assume that Bryant did not have the benefit of counsel during his prior tribal court domestic abuse proceedings.[4]

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[3] In its supplemental brief addressing the impact of *First* on this case, the government argued that it could rely on Bryant's tribal court convictions for another reason: at least two of his tribal court domestic abuse convictions did not result in a term of imprisonment, and therefore, did comport with the Sixth Amendment. The government has since conceded that Bryant does not have two prior tribal court domestic abuse convictions that did not result in a sentence of incarceration.

[4] Moreover, there is no serious doubt that Bryant was not appointed counsel during his tribal court domestic abuse proceedings. The Law and Order Code of the Northern Cheyenne Tribe, Title 5, Chapter III, Rule 22 provides that a defendant in a criminal case has the right to "defend himself . . . by . . . [an] attorney at

The merits of this case pose a more difficult question. The United States Constitution guarantees criminal defendants the right to assistance of counsel for their defense. U.S. Const. amend. VI; *see also Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The right to appointed counsel for indigent criminal defendants is a "logical corollary" of this guarantee. *Powell v. Alabama*, 287 U.S. 45, 72 (1932).

In a line of cases beginning with *Powell*, the Supreme Court has set forth when the right to appointed counsel is triggered. *See id.* at 68-69, 71-72 (holding that the Fourteenth Amendment provides capital defendants with a right to appointed counsel because the due process right to be heard encompasses a right to be heard by counsel). In *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), the Court recognized that the Sixth Amendment guarantees indigent criminal defendants the right to appointed counsel in federal proceedings. The Court subsequently held that the Sixth Amendment right to appointed counsel applies to the states as well through the Fourteenth Amendment. *Gideon*, 372 U.S. at 342-45.

Johnson and *Gideon* involved felony prosecutions, but the Court later clarified that the right to appointed counsel for indigent defendants attaches in all criminal cases "where loss of liberty is . . . involved," regardless of how a crime is classified. *Argersinger v. Hamlin*, 407

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his own expense." The Tribe does not guarantee a right to appointed counsel in any case.

U.S. 25, 37 (1972). In *Scott*, the Court further refined the right, holding that indigent defendants are entitled to appointed counsel only in those cases where a term of imprisonment is actually imposed, and not in every case where a term of imprisonment could be imposed. 440 U.S. at 369, 373-74. Finally, in *Alabama v. Shelton*, 535 U.S. 654, 658, 662, 674 (2002), the Court concluded that imposition of a suspended sentence constitutes a term of imprisonment that triggers the Sixth Amendment right to appointed counsel.

However, the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings, *First*, 731 F.3d at 1002; *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976), because the Constitution is generally inapplicable to tribal courts, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896).[5] Consequently, Bryant's prior un-

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[5] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56. Congress nonetheless has plenary authority to impose limits on tribal self-government. *Id.* Acting under its plenary authority, Congress has required tribal courts to provide a limited right to counsel in criminal tribal court proceedings through the Indian Civil Rights Act ("ICRA"), which mandates that criminal defendants in tribal court be permitted to retain counsel at their own expense, and the Tribal Law and Order Act of 2010, which requires tribes to provide indigent defendants with appointed counsel in those cases where

counseled tribal court convictions that resulted in terms of imprisonment are not unconstitutional, and Bryant does not contend otherwise. Rather, Bryant argues that, because his convictions would have been unconstitutional had they been obtained in state or federal court, they may not be used to prove his guilt in a § 117(a) prosecution.

We agree that Bryant's prior tribal court domestic abuse convictions would have violated the Sixth Amendment had they been obtained in state or federal court. Under *Argersinger* and *Scott*, indigent criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed. *Scott*, 440 U.S. at 369, 373-74; *Argersinger*, 407 U.S. at 37. We must examine another line of cases, however, to determine whether convictions arising from proceedings that neither violate the Sixth Amendment nor provide an equivalent right to counsel may be used to prove an element of the offense in a later federal prosecution.

In a series of cases following *Gideon*, the Supreme Court addressed whether prior convictions obtained in violation of the Sixth Amendment right to counsel may be used in subsequent proceedings. In the first few such cases, the Court consistently held that uncounseled convictions obtained in violation of *Gideon* could not be used

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the tribal court imposes a term of imprisonment that exceeds one year. *See First*, 731 F.3d at 1002 & n.3. Indian tribes are, or course, free to grant additional rights through their own laws. *See id.* at 1003 & n.4.

in subsequent proceedings to (1) prove the prior felony conviction element of a recidivist statute, *Burgett v. Texas*, 389 U.S. 109, 111, 114-16 (1967), (2) impose a higher sentence based on a prior conviction, *United States v. Tucker*, 404 U.S. 443, 447, 449 (1972), or (3) impeach a defendant's credibility, *Loper v. Beto*, 405 U.S. 473, 476, 482-83 (1972) (plurality opinion).

In *Lewis v. United States*, 445 U.S. 55, 66-67 (1980), the Court held, for the first time, that a prior conviction that violated the Sixth Amendment could be used in a subsequent prosecution. In *Lewis*, the defendant was convicted under a predecessor felon-in-possession-of-a-firearm statute. *Id.* at 57-58. He challenged the government's use of a prior conviction obtained in violation of *Gideon* to prove he was a felon. *Id.* The Court acknowledged *Burgett*, *Tucker*, and *Loper*, but did not read those cases to stand for the proposition that "an uncounseled conviction is invalid for all purposes." *Id.* at 66-67. It concluded that Lewis's prior uncounseled conviction could be used in a subsequent prosecution because the conviction was providing a basis for imposing only a firearms prohibition—an "essentially civil disability," albeit one that was "enforceable by a criminal sanction." *Id.* at 67.

Not long after *Lewis*, the Court considered whether an uncounseled conviction that did not result in imprisonment—and therefore did not run afoul of the Sixth Amendment—could be used in a subsequent prosecution under a recidivist statute. *See Baldasar v. Illinois*, 446 U.S. 222, 223-24 (1980), *overruled by Nichols v. United*

States, 511 U.S. 738 (1994). In a splintered decision, five justices, in three separate opinions, ruled that it could not. Lower courts struggled to interpret and apply *Baldasar*, *see Nichols*, 511 U.S. at 745, and, ultimately, the Court revisited a similar question in *Nichols*. In *Nichols*, the defendant pled guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846. *Id.* at 740. When calculating Nichols's criminal history points during sentencing, the district court considered a prior uncounseled state court conviction for which Nichols received a fine but was not incarcerated. *Id.* The Court held that an uncounseled prior conviction valid under *Scott*—as Nichols's was—"may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 746-47.

The Supreme Court has never addressed whether a conviction obtained in a forum not governed by the Constitution under procedures that do not comport with the Sixth Amendment right to counsel may be used in a subsequent prosecution. Our court, however, has twice addressed this issue. In *Ant*, we considered whether an uncounseled tribal court guilty plea to charges of assault and battery, which resulted in a six-month term of imprisonment, could be introduced as evidence of guilt in a subsequent federal prosecution for manslaughter arising out of the same incident. 882 F.2d at 1390-91. We held that it could not, reasoning that "if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal pro-

secution absent a knowing and intelligent waiver" of his right to counsel. *Id.* at 1394. This fact rendered the plea "constitutionally infirm" and inadmissible in a later federal prosecution. *Id.* at 1395.

More recently, in *First*, we considered whether a prior uncounseled tribal court conviction that resulted in a term of imprisonment could be used as the predicate offense in a prosecution under 18 U.S.C. § 922(g)(9). 731 F.3d at 1000-01, 1003. Section 922(g)(9) makes it unlawful for a person convicted of a misdemeanor domestic violence offense to possess a firearm. Noting the similarity between § 922(g)(9) and the statute in *Lewis*, we concluded that "it is of no moment that First's misdemeanor conviction was obtained without complying with the Sixth Amendment," because the government sought to use the conviction only to enforce a civil firearms disability. *Id.* at 1008-09. In so holding, we discussed *Ant*, stating as follows:

> We do not question *Ant*'s continued vitality. *Ant* stands for the general proposition that even when tribal court proceedings comply with ICRA and tribal law, if the denial of counsel in that proceeding violates federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution. *Lewis*, however, demonstrates that the federal firearms statute is an exception from this general rule.

Id. at 1008 n.9 (internal citations omitted).

We agree that, as a general rule, *Ant* holds that a conviction obtained in a tribal court that did not afford a right to counsel equivalent to the Sixth Amendment right may not be used in a subsequent federal prosecution. Accordingly, we hold that, subject to the narrow exception recognized in *Lewis* and *First* for statutes that serve merely as enforcement mechanisms for civil disabilities, tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right. Section 117(a) is an ordinary recidivist statute and not a criminal enforcement scheme for a civil disability. Accordingly, the general rule announced in *Ant* applies. Because Bryant's tribal court domestic abuse convictions would have violated the Sixth Amendment right to counsel had they been obtained in federal or state court, using them to establish an element of the offense in a subsequent § 117(a) prosecution is constitutionally impermissible. *See Ant*, 882 F.2d at 1394-95.

We reject the government's arguments to the contrary. The government contends this case is controlled by *Nichols*, not *Ant*. But *Nichols* involved a prior conviction that did comport with the Sixth Amendment, 511 U.S. at 740, 746-47, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment. *Ant* is the relevant authority.

The government also argues that *Ant* is no longer good law because it relied on *Baldasar*, which *Nichols*

overruled. *Ant* cited *Baldasar* only once, and for the general proposition that an uncounseled conviction could not be used to prove an element of a recidivist statute. *Ant*, 882 F.2d at 1394. *Nichols* did overrule *Baldasar*'s holding that an uncounseled conviction valid under *Scott* could not be used in a subsequent prosecution. *Nichols*, 511 U.S. at 746-47. But even after *Nichols*, uncounseled convictions that resulted in imprisonment generally could not be used in subsequent prosecutions. *See id.* *But see Lewis*, 445 U.S. at 66-67. Because *Ant* involved the latter scenario, *see* 882 F.2d at 1390-91, it remains good law notwithstanding its citation to *Baldasar*.

Moreover, for us to overrule our own precedent, a Supreme Court decision "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1235 (9th Cir. 2007) (explaining that where a Supreme Court case did not actually address the issue raised in a prior Ninth Circuit case, a three-judge panel remained bound by circuit precedent notwithstanding the implications of the subsequent Supreme Court case). *Nichols* and *Ant* are easily reconcilable because *Nichols* involved an uncounseled conviction valid under the Sixth Amendment, whereas *Ant* involved prior tribal court proceedings that, in state or federal court, would not have been valid under the Sixth Amendment. Accordingly, we read *Nichols* and *Ant* to stand for the proposition that,

subject to the limited exception recognized in *Lewis* and *First*, the Sixth Amendment permits using a prior conviction in a later prosecution only if, in the prior proceeding, the defendant was afforded, at a minimum, the same right to counsel as guaranteed by the Sixth Amendment. Nothing in *Nichols* mandates adopting the government's position that, as long as the conviction does not violate the Constitution, it may be used in a later prosecution.

We recognize that our holding places us in conflict with two other circuits. *See United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). *Shavanaux* and *Cavanaugh* held that a prior uncounseled tribal court conviction could be used as a predicate offense for a § 117(a) prosecution. *Shavanaux*, 647 F.3d at 997; *Cavanaugh*, 643 F.3d at 603-04. The *Shavanaux* court reasoned that, because the Sixth Amendment does not apply in tribal court, using a tribal court conviction in a subsequent prosecution cannot violate the Sixth Amendment. 647 F.3d at 996-98. The *Cavanaugh* court read *Nichols* as establishing a bright-line rule that so long as a conviction did not violate the Constitution, it could be used in a subsequent proceeding. 643 F.3d at 603-04.

Shavanaux and *Cavanaugh* cannot be reconciled with *Ant*, and we are bound by *Ant*.[6]

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[6] In fact, both the Eighth Circuit and the Tenth Circuit recognized that their holdings were at odds with *Ant*. *Shavanaux*, 647 F.3d at 997-98; *Cavanaugh*, 643 F.3d at 604-05.

The *Shavanaux* court rejected *Ant* as wrongly decided. 647 F.3d at 997-98. It disagreed with *Ant*'s "threshold determination that an uncounseled tribal conviction is constitutionally infirm," believing that this determination was a consequence of having "overlook[ed]" the *Talton* line of cases establishing that tribal courts are not governed by the Constitution. *Id.* But *Ant* did not overlook this case law. Although *Ant* did not cite *Talton*, it recognized repeatedly that tribal court proceedings are limited only by the ICRA and tribal law. *See* 882 F.2d at 1391-92, 1395. In describing Ant's guilty plea as "constitutionally infirm," the *Ant* court used a convenient shorthand term to refer to the fact that Ant's guilty plea, although not obtained in violation of the Constitution, was obtained through procedures that, had they been employed in state or federal court, would have been unconstitutional. Read in context, the term does not suggest that *Ant*'s holding is based on the faulty premise that the Constitution applies to tribal court proceedings.

The *Cavanaugh* court distinguished *Ant*, because in *Ant*, the subsequent federal proceeding arose out of the same incident as the tribal court proceeding and the government sought to use a guilty plea that did not comport with the Sixth Amendment to prove, not merely the fact of a prior conviction, but the truth of the matter asserted in the plea. *See* 643 F.3d at 604-05. This is a distinction without a difference. As the *Cavanaugh* dissent explained, the key factor in both *Ant* and *Cavanaugh* was the government's reliance on prior tribal court proceedings, that, if governed by the Constitution, would have violated the Sixth Amendment right to counsel to prove an element of the offense. *Id.* at 607 (Bye, J., dissenting).

As we did in *First*, we reiterate *Ant*'s continued vitality. *See* 731 F.3d at 1008 n.9. Under *Ant*, the government may not rely on tribal court convictions as predicate offenses in § 117(a) prosecutions unless the tribal court afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions. *See* 882 F.2d at 1394-95. Bryant's relevant tribal court convictions do not meet this standard. Consequently, the charges against him must be dismissed.[7]

IV. CONCLUSION

We hold that the § 117(a) charges against Bryant must be dismissed because at least one of his predicate tribal court domestic abuse convictions was uncounseled and resulted in a term of imprisonment.

REVERSED.

WATFORD, Circuit Judge, concurring:

I agree with the majority that *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), remains binding and controls the outcome of this case. I write separately to

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[7] Bryant also argues that using his tribal court convictions as predicate offenses is a violation of the Fifth Amendment's guarantee of equal protection because only Indians are subject to prosecution based on prior convictions that do not comport with the Sixth Amendment right to counsel. Given the result we reach, we need not address Bryant's equal protection argument.

highlight three reasons why, in my view, *Ant* warrants reexamination.

1. The Supreme Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), doesn't squarely overrule *Ant*, but it does call *Ant*'s reasoning into question. *Nichols* held that an uncounseled misdemeanor conviction valid under *Scott v. Illinois*, 440 U.S. 367 (1979)—because no term of imprisonment was imposed—may be used "to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." 511 U.S. at 746-47. The Court's holding undermines the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case. *Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings.

That principle is hard to square with the result we reach today by applying *Ant*. It's true that Michael Bryant's prior domestic abuse convictions would have been obtained in violation of the Sixth Amendment had he been tried in state or federal court, since he lacked appointed counsel and appears to have received a term of imprisonment following those convictions. *See Scott*, 440 U.S. at 373-74. But the fact remains that his prior convictions were *not* obtained in violation of the Sixth Amendment because they occurred in tribal court, where the Sixth Amendment doesn't apply. *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001). It seems odd to say that a

conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected. As the Tenth Circuit stated, "Use of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance." *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (citation omitted). The contrary rule we adopted in *Ant* would make sense if uncounseled convictions were deemed insufficiently reliable to warrant giving them any weight in subsequent criminal proceedings. But, as I've noted, *Nichols* undercuts the proposition that uncounseled convictions are categorically unreliable.

Further doubt is cast on *Ant*'s vitality when we consider the exception carved out in *Lewis v. United States*, 445 U.S. 55 (1980), and *United States v. First*, 731 F.3d 998 (9th Cir. 2013). In *Lewis*, the Supreme Court held that a felony conviction obtained in violation of the Sixth Amendment could nevertheless be used as a predicate for a felon-in-possession charge. 445 U.S. at 67. The Court reasoned that the firearms prohibition relied "on the mere fact of conviction," not the reliability of that conviction, to enforce through criminal sanctions what amounted to only "a civil disability." *Id.* We felt compelled to follow this precedent in *First*, where we held that an uncounseled tribal court conviction that would have violated the Sixth Amendment if obtained in state or federal

court could also be used as a predicate for a similar firearms possession statute. 731 F.3d at 1008-09.

The resulting asymmetry is striking. In *Lewis* and *First*, the "mere fact of conviction," even if unreliable and unconstitutionally obtained, could be used to criminalize an act that might otherwise be lawful—firearms possession. *Lewis*, 445 U.S. at 67; *First*, 731 F.3d at 1008-09. Here, however, the "mere fact" of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence. That seems illogical. If anything, we would want to be more cautious about the use of uncounseled prior convictions in prohibiting firearms possession, because that prohibition impinges upon what would otherwise be a fundamental right. We aren't impinging upon anyone's rights when we prohibit (or enhance penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with. The reason for holding that the Sixth Amendment is violated in this case but not in *Lewis* and *First* isn't easy to grasp.

2. So why *are* we refusing to recognize the validity of Bryant's prior domestic abuse convictions in this case, given that the convictions themselves aren't constitutionally infirm? Presumably it's because of concerns over the reliability of those convictions. As discussed above, though, that concern apparently doesn't exist across the board with respect to uncounseled convictions obtained in state or federal courts. So aren't we really saying that the right to appointed counsel is necessary to ensure the

reliability of all *tribal* court convictions? If that's true, we seem to be denigrating the integrity of tribal courts, as discussed in the dissent in *Ant*. *See* 882 F.2d at 1397-98 (O'Scannlain, J., dissenting). The implication is that, if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts' respect. While in our adversarial system we've concluded that the lack of counsel detracts from the accuracy and fairness of a criminal proceeding, *see Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963), respect for the integrity of an independent sovereign's courts should preclude such quick judgment. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997).

3. It's perhaps unsurprising that our decision in this case conflicts with decisions from two of our sister circuits. Faced with almost identical scenarios—prior, uncounseled tribal court convictions that would have violated the Sixth Amendment in state or federal court and that were used as predicate offenses under 18 U.S.C. § 117—the Eighth and Tenth Circuits pointedly disagreed with us. *See United States v. Cavanaugh*, 643 F.3d 592, 595, 604 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993, 995-98 (10th Cir. 2011). As our colleagues on the Eighth Circuit noted, "Supreme Court authority in this area is unclear; reasonable decisionmakers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply."

Cavanaugh, 643 F.3d at 605. Given this circuit split and the lack of clarity in this area of Sixth Amendment law, the Supreme Court's intervention seems warranted.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR-11-70-BLG-JDS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL BRYANT, JR., DEFENDANT

Wed., Dec. 21, 2011
10:21:44 to 10:36:59

TRANSCRIPT OF HEARING ON MOTION

APPEARANCES:

FOR THE PLAINTIFF:

MR. E. VINCENT CARROLL
Assistant U.S. Attorney
P.O. Box 1478
Billings, Montana 59103

FOR THE DEFENDANT:

MR. STEVEN C. BABCOCK
Attorney at Law
Federal Defenders of Montana
2702 Montana Avenue, Suite 101
Billings, Montana 59101

[3]

PROCEEDINGS

(Open court.)

(Defendant present.)

THE COURT: We'll hear the matter of *Michael Bryant.*

This is the motion to dismiss the indictment.

Mr. Babcock, you have filed a motion to dismiss the indictment on the basis that the violations that were used in the indictment were before a tribal court where he did not have the right to counsel and that he entered a guilty plea, apparently, to two different violations that occurred on the Northern Cheyenne Indian Reservation without the benefit of counsel.

MR. BABCOCK: That's correct, Your Honor.

THE COURT: And you set out, in your motion, the cases that you rely upon, and I will allow you to expound on that, and then I will have the government's response.

MR. BABCOCK: Thank you, Your Honor.

There's two different claims that I've made in this case as set forth in my brief in support of the motion. First is that this is in violation of the Sixth Amendment and the indictment should be dismissed,

and also this particular situation is in violation of the Equal Protection Clause of the Constitution.

In taking a look at the Sixth Amendment violation, I believe that it is undisputed that the prior convictions that [4] are used in this case to form the predicate convictions for 18 U.S.C. 117 were without counsel, and that is because the Sixth Amendment does not attach, the Bill of Rights does not attach to the Indian Civil Rights Act.

Mr. Bryant has previous convictions—we are not disputing that—in Northern Cheyenne Tribal Court, but he was not afforded counsel at that particular time. I do believe that he has either four or five convictions in Northern Cheyenne Tribal Court. I think it's undisputed that he was not provided counsel on any one of those convictions. It appears to me, from the records that I've been able to obtain, that on the majority of those convictions, he pled guilty at arraignment. He was either released or he was sent to a voluntary work program on the case. I don't have any transcripts from those, and I do believe that the most recent conviction was back from 2007.

In taking a look at the case law on this case, Your Honor, this issue has been decided in two other circuits. I believe that it's a matter of first impression in this district and also in this circuit. There's no Ninth Circuit law on this. There is a case out of the Eighth Circuit and also out of the Eleventh Circuit,

but I think that those cases can be distinguished because of current Ninth Circuit law that we do have.

The Eighth Circuit case in *Cavanaugh* and the [5] Eleventh Circuit case in *Shavanaux* have stated, because the Indian Civil Rights Act was not violated with the prior tribal conviction, that it would not be a violation of the Sixth Amendment when used as a predicate offense to form the basis of 18 U.S.C. 117.

I do find that logic amazing when taking a look at the current case law in the Ninth Circuit in *United States v. Ant*. *United States v. Ant* is a case that is controlling—it is out of the Ninth Circuit—that held that a guilty plea in tribal court could not be used to prove the underlying facts of a subsequent federal charge. Why? Because the Ninth Circuit held that it was a violation of the Sixth Amendment.

The Eighth Circuit in *Cavanaugh* tried to distinguish it because they're saying that it happened with the same offense. I would say to this Court that that is a difference without distinction. You are still using a conviction that could have been in violation of the United States Constitution to prove a case in federal court. The Eleventh Circuit just more or less sidesteps that issue.

So what we have in this case is we have an individual that was convicted in tribal court with a conviction that—it's undisputed—would have been in violation of the Sixth Amendment if it would have been in

any other court besides tribal court, but then we use that conviction to prove an essential element of 18 U.S.C. 117.

[6]

I do believe, in taking and relying upon the logic that was set forth in *United States v. Ant*, that this charge, as it stands, because of the prior uncounseled convictions, is in direct violation of the Sixth Amendment and the indictment should be dismissed.

The other basis for the motion to dismiss was the violation of equal protection. Now the case that is always cited to on an equal protection claim as it relates to Native Americans is *United States v. Antelope*. In *United States v. Antelope*, to summarize the holding, the Ninth Circuit held that a prosecution of Indians for a felony and murder was not a violation of the Equal Protection Clause because Indians were treated the same as everyone else prosecuted in a federal enclave.

The situation in this particular case is far different than in *Antelope*, because I know of no other group of individuals that would be in this situation besides Native Americans. The statute requires that there be two prior convictions in either federal, state, or Indian tribal court proceedings. Any white person, any African-American, any Latino, any other person of any other race is not going to be prosecuted in tribal court, because in order to be in tribal court, you have

to be a member of the tribe; hence, you have to be Native American.

I would say that because of the fact that only [7] Native Americans are going to be in a situation that they have a prior conviction from an uncounseled predicate conviction, in other words, a violation of the Sixth Amendment, that it is different than *Antelope*, and the Court should also find that this is a violation of the Equal Protection Clause.

In *Cavanaugh*, in taking a look at the reason as set forth in that case, they say that reasonable decisionmakers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not. That's their holding on the case, "reasonable decisionmakers may differ."

Well, I certainly think, when you take a look at the law in the Ninth Circuit, in applying it with *United States v. Ant*, that we are in a situation that we are reasonable decisionmakers that must differ from the holding in that case.

So based upon those reasons, Your Honor, as stated today in open court and also the briefing that has been provided to the Court, we ask respectfully on two grounds—that it's a violation of the Sixth Amendment and also a violation of the Equal Protection Clause—that the indictment in this case be dismissed.

THE COURT: I will ask you, did the defendant ever—was he incarcerated for any of his tribal court domestic ássault convictions?

[8]

MR. BABCOCK: Yes, he was, Your Honor. He was held, and that's one of the things that was brought out in *Cavanaugh*. In taking a look at it, they said that in their holding, if I may expound on that, in that, they're saying according as a matter of first impression, they hold that, "In the absence of any other allegations or irregularities or claims of actual innocence surrounding the prior conviction, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation." Your Honor, I find that odd because the Sixth Amendment violation is certainly an actual constitutional violation.

However, in taking a look at that case, this is very difficult because we have to go back and determine what exactly happened at an arraignment in 2007 or 2005 in tribal court. All we have is the judgments from those cases that said he pled guilty at arraignment. In some of those cases, he was actually incarcerated. He either had to work, get out in a voluntary work program, or he had to sit out his fine. The fine on a couple of them, I believe, was $500; other ones, he actually was sentenced to some incarceration.

But whether or not the proceeding had any other irregularities or actual claims of innocence, I really

can't expound on that because I can't go back over four years and find a transcript that doesn't exist.

In Mr. Bryant's situation, as he's told me—and [9] the only thing I can proffer to the Court on these cases is that a lot of the individuals, they will plead guilty if there's a chance for them just to get out of jail.

And on a whole different issue, being incarcerated in the Northern Cheyenne Tribal Detention Facility at that time, or as they now are combined with the Crow Detention Facility, it's not exactly a fantastic place for an individual to be serving their time at, so a lot of people will just plead guilty with the chance of getting out.

So he was incarcerated on some, but, once again, the records are hard to obtain, and all that we have are the convictions on the case, and the newest, from what I can find, is over four years old.

Thank you.

THE COURT: I'll hear from the government.

MR. CARROLL: Your Honor, the analysis or the rationale both in the *Cavanaugh* case and the *Shavanaux* case, as I set out in the government's brief, warrants this Court dismissing—or not dismissing but overruling the defendant's motion to dismiss the indictment in this case.

Counsel has proffered two arguments, that the violation of the Sixth Amendment and violation of Equal Protection justify dismissing the indictment, and as the government set out in its brief, the rationale of the two cases, the one from the Eighth Circuit and the one from the [10] Tenth Circuit, support this Court denying the defendant's motion.

And, Your Honor, in preparing for this hearing, I came across another case that I think is appropriate. I will be glad to provide the Court with a supplemental, supplemental authority or briefing on this particular case. It's *Lewis v. United States*, 445 U.S. 55. It's a 1980 case. By analogy, Your Honor, this case dealt specifically with a felon in possession, federal statute, under 922(g)(1), and the Court in that case held that Congress may constitutionally use a prior conviction as an element of an offense even if the prior conviction was invalid under *Gideon*. *Gideon* had held that prior conviction can't be used unless they, the defendant, had counsel. And the Court held that, even if there's some rational basis for the statutory distinctions made or they have some relevance to the purpose for which the classification is made.

And by analogy, Your Honor, you can compare a recidivist domestic violence offender to a person who is prohibited from owning a firearm because of the felony conviction. And by analogy, Your Honor, we would also argue that *Lewis* supports the upholding of this statute or the charge in this particular circumstance

given the defendant's prior history of domestic violence as applied in the context of the indictment charging a violation of Section 117.

[11]

Your Honor, for those reasons, we would just ask that the defendant's motion to dismiss the indictment be overruled.

THE COURT: I will give you just a couple minutes to respond, if you want.

MR. BABCOCK: Just briefly, Your Honor.

I would just ask the Court to concentrate on the analysis set forth in *United States v. Ant*, which is after the Supreme Court case that Mr. Carroll has cited.

And I think in this particular case there is great emphasis that the Eighth Circuit put on the status of Native Americans as being quasi-sovereign, and we are not at all saying that they need to provide representation on their tribal court proceedings. That's not at all what we're saying.

What we're saying, though, is that those constitutionally infirm convictions in tribal court—and that's undisputed. Everybody will admit as though that the Sixth Amendment was violated—that they should not be then able to be used for a predicate offense in the

United States federal court where the Constitution certainly applies.

Thank you.

THE COURT: I'm amazed, the little record on this as there is as far as previous appeals to different circuits. I would think that this would be a matter that would come up [12] very frequently and there would be a string of cases on it.

But I am going to deny the motion, that the convictions and the pleas do meet the criteria for the charge that's been filed here in the indictment.

MR. BABCOCK: (Nodded head affirmatively.)

THE COURT: So you can make some new ground here in the Ninth Circuit by appealing, if you want, but I'm going to deny the motion.

MR. BABCOCK: Thank you for your consideration, Your Honor.

THE LAW CLERK: All rise.

(Proceedings were concluded at 10:36:59.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-30177
D.C. No. 1:11-cr-00070-JDS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BRYANT, JR., DEFENDANT-APPELLANT

Filed: July 6, 2015

ORDER

Before: HARRY PREGERSON, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

Judge McKeown did not participate in the deliberations or vote in this case.

PAEZ, Circuit Judge, joined by PREGERSON, Circuit Judge, concurring in the denial of rehearing en banc:

The conflict that presents itself again and again in this case is how to apply *Nichols v. United States*, 511 U.S. 738 (1994), to cases like *Bryant*, where the government seeks to use uncounseled tribal court misdemeanor convictions as an essential element of a felony prosecution under 18 U.S.C. § 117(a).[1] The dissents from denial of rehearing en banc, along with two other circuits, urge a bright-line reading of *Nichols* that permits the use of these convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do). We write to explain why *Bryant* does not apply this

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[1] The full text of § 117(a) reads:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
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> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or
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> (2) an offense under chapter 110A,
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> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

bright-line rule, while recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*.

I

Nichols permits the use of a prior uncounseled misdemeanor conviction to enhance a sentence, so long as the conviction does not violate the Sixth Amendment. *Nichols*, 511 U.S. at 746-47 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)). That *Nichols* is a sentencing case is significant. The most salient difference between the guilt and punishment phases of criminal adjudication is that prosecutors must prove each element of an offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), while they generally need only prove the existence of a sentence enhancement factor by a preponderance of the evidence, *see Nichols*, 511 U.S. at 748. Nothing in *Nichols* purports to sanction the use of an uncounseled conviction for *Winship* purposes. Indeed, to permit the use of those misdemeanor convictions to establish an essential element of a § 117(a) felony prosecution would conflict with our long-held axiom that we hold the government to a *higher* burden when it seeks to prove an essential element of an offense. *See, e.g.*, *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007) (citing *Winship*, 397 U.S. at 364, and *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)).

The Court in *Nichols* acknowledged the reliability concerns that inhere in the Sixth Amendment right to counsel. Critically, the Court affirmed the sentencing

court's assessment of criminal history points under the United States Sentencing Guidelines because the sentencing court used the predicate uncounseled conviction during the sentencing phase, rather than the guilt phase. The Court concluded that the sentencing scheme in that case "accommodated" its reliability concerns because (1) under the Sentencing Guidelines, a defendant may "convince the sentencing court of the unreliability of any prior valid but uncounseled convictions"; and (2) the preponderance of the evidence standard used at sentencing necessarily connotes a less stringent reliability requirement. *Nichols*, 511 U.S. at 747-48; *id.* at 752 (Souter, J., concurring).

Nichols does not hold that an uncounseled conviction is sufficiently reliable to support a conviction in a future prosecution where, as in *Bryant* and *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), these accommodations are absent. It follows that *Nichols* does not invalidate the reliability concerns that underpin this court's precedent in *Ant*. Rather, *Nichols* leaves open the question of whether a potentially unreliable uncounseled misdemeanor conviction passes muster at the guilt phase. *Ant* fills this gap by holding that the government may not use prior tribal court misdemeanor convictions that do not provide an equivalent right of counsel as evidence of guilt in a subsequent federal prosecution. *See Ant*, 882 F.2d at 1396. This approach adheres to the Sixth Amendment's core interest in reliability.

II

Further complicating our reading of *Nichols* is the unique reason why Bryant's uncounseled convictions were constitutionally valid: the predicate convictions all occurred in tribal court, where the Sixth Amendment does not apply.[2] Statutes like § 117(a) affect both tribal and federal enforcement of serious crimes and raise difficult questions of tribal sovereignty. *Compare United States v. Wheeler*, 435 U.S. 313, 323-24 (1978) (affirming "the sovereign power to punish tribal offenders" as "the continued exercise of retained tribal sovereignty"), *with United States v. Lara*, 541 U.S. 193, 200 (2004) (describ-

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[2] Notably, *Nichols* involved the use of prior uncounseled convictions in the sentencing court's assessment of additional criminal history points under section 4A.1.1 of the Sentencing Guidelines. However, sentencing courts cannot consider tribal court convictions to compute a defendant's criminal history category. U.S.S.G. § 4A1.2(i). A sentencing court may depart from a defendant's criminal history category "[i]f reliable information indicates that the defendant's criminal history categorically substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes[.]" *Id.* § 4A1.3(a)(1). The court must specify in writing the reasons why an upward departure is warranted under this standard. *Id.* § 4A1.3(c)(1). Only then may the court consider "sentences for foreign and tribal offenses." *Id.* § 4A1.3(a)(2)(A). Nothing in *Nichols* contemplates extending its holding to uncounseled tribal court convictions, however, because the Court affirmed the use of Nichols's uncounseled convictions under section 4A1.1, not section 4A1.3.

ing Congress's plenary power to pass legislation affecting Indian tribes). In enacting § 117(a), Congress exercised its plenary power to permit more vigorous federal prosecution of serious crimes against women that tribes may not have the resources to address. The importance and urgency of these efforts, as emphasized by amicus curiae the National Congress of American Indians, are beyond dispute.

Congress, however, has readily coupled expanded tribal court jurisdiction with a commensurate right to counsel when due process so dictates. The Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, does not provide a right to counsel that is coextensive with the Constitution. Yet, as Congress has endeavored to curb domestic violence in Indian territory more aggressively, it also has moved toward expanding the right to counsel for tribal court defendants. *See id.* § 1302(a)-(c) (codifying the Tribal Law and Order Act of 2010, which allows tribal courts to prosecute felonies and increases tribal courts' sentencing authority, but also requires tribal courts to provide procedural safeguards, including an equivalent right to counsel, when they prosecute cases under such expanded jurisdiction); *id.* § 1304 (establishing a new "special domestic violence jurisdiction" to allow tribes to prosecute non-Indians who commit acts of domestic violence within the tribe's jurisdiction and requiring tribal courts to provide counsel to those defendants).

No part of the decision in *Bryant* is intended to express contempt for tribal courts. Nor does our decision

frustrate the purpose of § 117(a) simply because it conditions the use of prior tribal court misdemeanor convictions that result in imprisonment on the provision of counsel. Rather, it is consistent with Congress's dual interest in respecting tribal courts and ensuring due process for tribal court defendants.

For the reasons explained in the opinion and here, we concur in the decision not to take the case en banc. That said, given the sharp division over the important issues at stake in this case, Supreme Court review may be unavoidable.

OWENS, Circuit Judge, joined by O'SCANNLAIN, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and M. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

Michael Bryant likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out. Although his violence varies, his punishment never does. Despite Bryant's brutality—resulting in seven convictions for domestic violence—his worst sentence was a slap on the wrist: one year imprisonment, or what someone who "borrows" a neighbor's People magazine from the mailbox on two separate occasions could face. *See* 18 U.S.C. § 1701 (retarding the passage of mail).

There are many, many men like Michael Bryant. And there are even more victims of men like Michael Bryant. American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general. Att'y Gen.'s Advisory Comm. on Am. Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* 38 (2014). In light of the grave problem of domestic violence on tribal lands, Congress stepped up by passing the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, tit. IX, § 909, 119 Stat. 2960, 3084 (codified at 18 U.S.C.

§ 117). Tailored to the unique problems and scenarios that American Indian and Alaska Native Tribes face, § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize.

Yet a panel has wiped this important statute off the books. It interprets the Sixth Amendment as prohibiting the use of an uncounseled misdemeanor conviction in a recidivist statute. The panel acknowledges the split it creates with the Eighth and Tenth Circuits.[1] The result is to cut the Navajo Nation in half when it comes to combating this plague, as the border between the Ninth and Tenth Circuits divides its land. The Michael Bryants in Utah and New Mexico face the music of § 117(a), while the Bryants in Arizona play musical chairs, moving from one brutal beating to the next with virtual impunity. This decision has torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse.

This decision creates another even larger split that the panel does not acknowledge. By holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the panel splits with every circuit to seriously consider this issue. The panel's

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[1] *United States v. Shavanaux*, 647 F.3d 993, 997-98 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592, 595, 604 (8th Cir. 2011).

decision is clearly wrong, as the Supreme Court showed in *Alabama v. Shelton*: A prison sentence in these circumstances may be invalid, but the underlying misdemeanor conviction surely is not.[2]

Our justification for this legal and practical mess? *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), a case that my colleagues have described as "odd," "illogical," *United States v. Bryant*, 769 F.3d 671, 680-81 (9th Cir. 2014) (Watford, J., concurring), and "regrettabl[e]," *Ant*, 882 F.2d at 1397 (O'Scannlain, J., dissenting). It was wrong when decided, and it is really wrong now.

Bryant's victims are vulnerable enough, but this decision leaves them even worse off. It has stripped Congress and the American Indian and Alaska Native Tribes of the power to meaningfully punish the Bryants of the world and protect their victims from another beating (or worse). As our court has refused to take this case en banc, only the Supreme Court can rectify this terrible situation. I urge the Court to do so as soon as possible, be-

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[2] *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002); *see also United States v. Acuna-Reyna*, 677 F.3d 1282, 1284-85 (11th Cir. 2012) (noting that *Shelton* "affirmed in entirety" the decision of the Alabama Supreme Court to invalidate part of Shelton's sentence, but leave his misdemeanor conviction intact); *United States v. Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); *United States v. Moskovits*, 86 F.3d 1303, 1309 (3d Cir. 1996); *United States v. White*, 529 F.2d 1390, 1394 & n.4 (8th Cir. 1976). *But see United States v. Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (holding otherwise without the benefit of *Nichols* or *Shelton*); *Bryant*, 769 F.3d at 677.

fore Michael Bryant, and the many more men like him, terrorize more women and their families.

For these reasons, I respectfully dissent from the denial of rehearing en banc in this case.

O'SCANNLAIN, Circuit Judge, joined by GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, and OWENS, Circuit Judges, dissenting from the denial of rehearing en banc:

Judge Owens passionately reveals this opinion's pernicious impact on domestic violence victims, and I share his concern. I also write to explain why the legal errors that corrupt this opinion, and its predecessor *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), should have been corrected by our court sitting en banc.

Following *Ant*, the court decides that indisputably valid tribal court proceedings are "constitutionally infirm" because they do not afford the right to appointed counsel required by the Sixth Amendment. *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014) (citing *Ant*, 882 F.2d at 1394-95). A sensible result, perhaps, were it not for the fact that the Indian Civil Rights Act ("ICRA")—*not* the Sixth Amendment—governs tribal court proceedings. The court grudgingly acknowledges this fact. *Id.* at 675. Yet—undeterred in its quest to punish the tribal court for complying with the procedures that govern it—the court concludes that convictions procured in that venue are so defective that the federal government is barred from even proving the mere *existence* of such convictions in a later prosecution.

Such a decision cries out for review—indeed, with the concurral,[1] *every member of the panel* has acknowledged that this case requires the Supreme Court's attention.[2] It contravenes the Supreme Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), stands in direct conflict with the only two other circuit courts to consider the issue presented, and, ultimately, holds tribal courts in contempt for having the audacity to follow the law as it is, rather than the law as we think it should be.

I

To summarize briefly the necessary facts: Bryant, a Native American, was convicted of domestic assault in several uncounseled tribal court proceedings. *Bryant*, 769 F.3d at 673. Because the Sixth Amendment right to counsel does not apply to tribal courts, the resulting convictions under tribal law were indisputably valid. *Id.* at 675.

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[1] As explained by another member of this Court, the term "concurral" refers to a concurrence from denial of rehearing en banc. *See* Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale L.J. Online 601, 626 n.57 (2012).

[2] First, Judge Watford—who concluded that *Ant* afforded him no choice but to concur—wrote persuasively that *Ant* warrants reexamination and pleaded for "the Supreme Court's intervention." *Bryant*, 769 F.3d at 679, 681 (Watford, J., concurring). Now, the other two panel members also admit that "Supreme Court review may be unavoidable." Concurrence in Denial of Rehearing En Banc at 9.

Later, after Bryant again assaulted two women in 2011, the federal government sought to prosecute Bryant for these new assaults under 18 U.S.C. § 117, which criminalizes "domestic assault by an habitual offender." Under section 117, the prosecution not only had to prove Bryant had "commit[ted] a domestic assault" in 2011, but also that he had been convicted of domestic assault "on at least 2 separate prior occasions in Federal, State, or Indian tribal court." 18 U.S.C § 117. To satisfy this recidivism element, the government sought to rely on Bryant's prior tribal court convictions. *Bryant*, 769 F.3d at 673-74.

Bryant conceded such convictions were valid and obtained in compliance with the ICRA, but argued that they could not be used to satisfy an element of section 117 because they *would* have violated the Sixth Amendment *if* they had been obtained in state or federal court. *Id.* at 674-75. The district court rejected Bryant's argument, and he appealed. *Id.* at 673-74.

A

Our Court was not the first to consider the use of an uncounseled tribal court conviction in a section 117 prosecution. Exactly the same question was posed to the Eighth and Tenth Circuits, and they concluded that using the prior convictions posed no constitutional difficulty. *See United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011).

Yet the court flatly disagreed with our sister circuits, and held that the government could not rely on tribal court convictions unless they afforded the same right to counsel required by the Sixth Amendment—notwithstanding the inapplicability of the Sixth Amendment to tribal courts. *Bryant*, 769 F.3d at 679.

Why did the court toss aside the reasoning of our sister circuits and turn up its nose at completely valid tribal court proceedings? Because of *Ant*. In that case we derided a tribal court guilty plea as "constitutionally infirm" because it merely "was made in compliance with tribal law and with the ICRA," rather than the Sixth Amendment. *Ant*, 882 F.2d at 1395. We considered it but a trifle that the Sixth Amendment does not in fact apply to tribal proceedings—because the uncounseled plea would have been invalid in *our* Court, we ordered it be suppressed. *Id.* at 1396.

B

Relying on *Ant*, the court here held that "the government may not rely on tribal court convictions as predicate offenses in § 117(a) prosecutions unless the tribal court afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions." *Bryant*, 769 F.3d 671, 679 (9th Cir. 2014) (citing *Ant*, 882 F.2d at 1394-95). As in *Ant*, it was apparently of little consequence to the court that imposing the Sixth Amendment's requirements on tribal courts conflicts with the procedures Congress laid out in the ICRA.

The court reinforces and repeats *Ant*'s error in trampling on tribal court proceedings and in disregarding the ICRA. But that is not all. Its error in applying *Ant* is magnified by the fact that *Nichols*—which post-dated *Ant*—stripped *Ant* of any legitimacy and exposed it as a naked assault on tribal courts and the ICRA.

II

At the time of *Ant*, we tried to conceal our contempt for tribal courts in the tangled thicket of *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), in which a hopelessly fractured[3] Court held that a valid but uncounseled *state* misdemeanor conviction could not be used in a subsequent federal prosecution. *See Ant*, 882 F.2d at 1394 (relying on *Baldasar* for the proposition "that if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal prosecution"). *Baldasar* appeared to provide us with some cover—if state court proceedings that were valid but uncounseled could not be used in subsequent federal proceedings, then perhaps valid but uncounseled tribal court proceedings could not be so used either.

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[3] *Baldasar* was a mess—providing no rationale for its result, the per curiam opinion instead rested on the varying "reasons stated in [its] [three] concurring opinions." *Nichols*, 511 U.S. at 743-44 (quoting *Baldasar*, 446 U.S. at 224). With nothing resembling a clear holding, *Baldasar* "baffled and divided the lower courts that [] considered it." *Id.* at 746.

Fortunately, *Nichols* cleared out the underbrush of *Baldasar* and overruled it. Adopting the reasoning of the *Baldasar* dissenters, *Nichols* held that "an uncounseled conviction valid under *Scott* [*v. Illinois*][4] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Nichols*, 511 U.S. at 746-47.

A

Unfortunately, at least for our Court, *Nichols*'s overruling of *Baldasar* exposes our decision in *Ant*—and now this opinion—as based on nothing more than a persistent distrust for tribal courts and a failure to accept that the Sixth Amendment does not apply to tribal proceedings. Viewing *Ant* in light of *Nichols*, one is immediately faced with a puzzling conundrum: If an uncounseled but valid *state* court conviction can support a later federal prosecution under a recidivist statute, then why is it that an uncounseled but valid *tribal* court conviction cannot do the same?

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[4] Under *Scott*, the Sixth Amendment right to counsel does not apply to uncounseled state or federal proceedings in which a sentence of imprisonment is not imposed. *Scott v. Illinois*, 440 U.S. 367, 372 (1979). *Scott* was relevant to *Nichols* because Nichols challenged a sentencing enhancement that was based on a prior uncounseled misdemeanor DUI conviction—and, under *Scott*, because Nichols's conviction did not include a sentence of imprisonment, "the Sixth Amendment right to counsel did not obtain." *Nichols*, 511 U.S. at 741, 746.

B

The court struggles to explain this anomaly without success.

Its arguments are but slightly rephrased repetitions of a common theme: that "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." *Bryant*, 769 F.3d at 677 (internal citations omitted).

Yet the court's argument is illogical. Both Nichols's and Bryant's uncounseled convictions "comport" with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction.

C

Further, the fact that the prior tribal court proceedings "*would* have violated the Sixth Amendment" *if* they were "in state or federal court" is irrelevant—using a federal recidivist statute to prosecute Bryant does not transform his prior, valid, tribal court convictions into new, invalid, federal ones. *Bryant*, 769 F.3d at 678.[5]

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[5] Indeed, as the Supreme Court has "consistently" made clear, recidivist statutes "penaliz[e] only the last offense committed by the defendant"—here, Bryant's 2011 offenses, not the prior abuses for which he was tried in tribal court. *Nichols*, 511 U.S. at 747; *see also United States v. Rodriquez*, 553 U.S. 377, 386 (2008) ("When a

Of course, Bryant could not be punished for recidivism if his prior convictions *actually* contravened the Sixth Amendment, because he then would "in effect suffer[] anew from the deprivation of that Sixth Amendment right." *Burgett v. Texas*, 389 U.S. 109, 115 (1967). But here there is no Sixth Amendment violation for Bryant to "suffer anew." *See Bryant*, 769 F.3d at 679 (Watford, J., concurring) (citing *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011)).

Just like Nichols—whose state proceedings were valid but uncounseled, and certainly did not "afford" him the right to appointed counsel guaranteed by the Sixth Amendment—Bryant has never suffered through any constitutionally deficient proceeding, and thus, just like Nichols, his uncounseled but valid convictions can be used to satisfy a federal statute's recidivism element.

III

It seems that this should have been an easy case. After *Nichols*, an uncounseled but valid conviction can be used in a subsequent prosecution under a recidivist statute. Bryant's uncounseled tribal convictions are valid, and the government is seeking to use them in a subsequent prosecution under a recidivist statute.

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defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.'").

Why then, does the court refuse to allow the government to rely on the tribal court convictions?

A

There can only be one answer—the court is uncomfortable with tribal court procedures and the ICRA.

If, as *Nichols* holds, uncounseled convictions in general *are not* unreliable, then *Ant*'s outcome—and this opinion's—must rest on an assumption that tribal court convictions *are* inherently unreliable. Such an assumption runs directly counter to the Supreme Court's command to respect Indian tribes as "distinct, independent political communities," *Worcester v. State of Georgia*, 31 U.S. 515, 559 (1832), whose judicial systems must be assessed based on their compliance with the ICRA, not the federal constitution. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (explaining that it is beyond dispute that the "Bill of Rights does not apply to Indian tribes").

B

By concluding that tribal court decisions are inherently suspect even when they comply with the ICRA, *Ant* and this opinion trample upon the principles of comity and respect that undergird federal court recognition of tribal court judgments. *See Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (extending comity to tribal courts).

As *Wilson* observed:

> Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure .... Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.

Id. at 811 (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)) (internal quotation marks omitted).

Yet, here the court holds that "tribal court convictions may be used in subsequent prosecutions *only if* the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right," *Bryant*, 769 F.3d at 677 (emphasis added), imposing "judicial procedures identical to those used in the United States Courts." *Wilson*, 127 F.3d at 810. The court exercises the very judicial paternalism warned against in *Wilson*, and acts in derogation of tribal self-governance.

Sadly, distaste for the ICRA and contempt for tribal courts has led the court to disregard the critical comity interest that undergirds respect for tribal courts and their criminal procedures and, contrary to the dictates of

Congress, the court "intrude[s] needlessly on tribal self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). This we cannot do.

IV

Both this opinion and *Ant* are contrary to Supreme Court precedent, invent a Sixth Amendment violation where none exists, erode tribal sovereignty, and disregard the ICRA. If that were not enough, this opinion creates a circuit split by disagreeing with all other circuit courts which have addressed the very issue presented. The concurrence and the concurral ask for Supreme Court intervention. It appears we need it.

I respectfully dissent from our regrettable decision not to rehear this case en banc.

APPENDIX D

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. 117 provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

Shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim share a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

4. 25 U.S.C. 1302 (2006) provides:

Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, house, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his

favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and[1] a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

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[1] So in original. Probably should be "or".

5. 25 U.S.C. 1302 provides:

Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have

compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year of a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United State or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effec-

tively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of In-

dian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country .

---

[1] See References in Text note below.

6. 25 U.S.C. 1303 provides:

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

No. 15-420

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2015

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

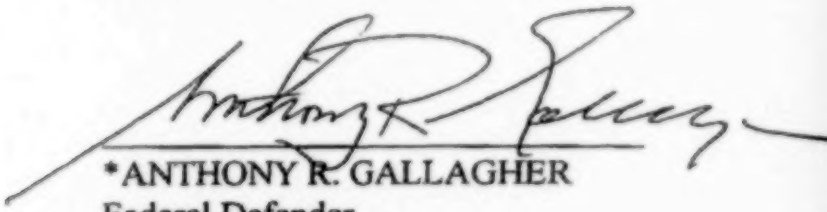
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Michael Bryant, Jr., asks leave to file the attached brief in opposition to a petition for writ of certiorari, without prepayment of costs and to

proceed *in forma pauperis*. Respondent has been granted leave to so proceed in both the U.S. District Court and the United States Court of Appeals for the Ninth Circuit. No affidavit is attached inasmuch as the U.S. District Court appointed counsel for Respondent under the Criminal Justice Act of 1964.

Respectfully submitted,



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November 4, 2015

No. 15-420

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No. 15-420

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America, which was the Appellee in the Ninth Circuit. Respondent is Michael Bryant Jr., who was the Appellant in the Ninth Circuit.

OPINIONS BELOW

1. The opinion of the Ninth Circuit is published and reported at 769 F.3d 671 (9th Cir. 2014). A copy of that opinion is set forth in the Addendum to this response.

2. The oral ruling of the district court denying Respondent's motion to dismiss is unreported.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's opinion was filed on September 30, 2014. (Addendum at pages 1-8.) Petitioner filed a petition for rehearing en banc on December 15, 2014. (Addendum at pages 9-48.) Respondent responded to the petition for rehearing en banc on March 17, 2015. (Addendum at pages 49–86.) The Ninth Circuit issued its order denying the petition for rehearing en banc on July 6, 2015. (Addendum at pages 87-93.) Petitioner filed its application for writ of certiorari with this Court on October 5, 2015. (Pet.) This Court's jurisdiction arises under 28 U.S.C. §1254(1). Respondent's response is timely because it was placed in the United States mail, first class postage pre-paid, on November 4, 2015, which is the last day for filing under the Rule of this Court. *See* Rule 15, ¶3.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, which provide in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law[.]
>
> U.S. Const., Amd. V

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> U.S. Const., Amd. VI

STATUTORY AND/OR FEDERAL RULES INVOLVED

This case involves 18 U.S.C. §117(a), which provides in part:

> **§117. Domestic assault by an habitual offender**
>
> **(a) In general.** Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction–

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

STATEMENT OF THE CASE

1. A Native American from the Northern Cheyenne Reservation, Respondent has never disputed he has prior domestic violence convictions from the Northern Cheyenne Tribal Court. Respondent was incarcerated as the result of some of the tribal court convictions. (Addendum at pages 54-55.) He did not have the assistance of counsel during proceedings on the tribal court convictions.

2. Respondent was indicted in the United States District Court for the District of Montana, Billings, Montana under 18 U.S.C. §117(a) with two counts of felony domestic assault by an habitual offender. (Addendum at page 55.) Prosecution under §117(a) requires a person to have "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court[.]" 18 U.S.C. §117(a).

3. Respondent moved to dismiss the Indictment, arguing it violated his Fifth and Sixth Amendment rights for Petitioner to rely on uncounseled tribal

convictions as predicates for prosecution under §117(a). (Addendum at page 55.) The district court denied the motion. (Addendum at page 55.) Respondent ultimately entered into a plea agreement, reserving his right to appeal the pretrial denial of his motion to dismiss. (Addendum at page 55.)

4. Respondent appealed to the Ninth Circuit. A three-Judge Panel, analyzing the issue under the Sixth Amendment, reversed holding:

> subject to the narrow exception recognized in *Lewis*[1] and *First*[2] for statutes that serve merely as enforcement mechanisms for civil disabilities, tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right.
>
> *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014) (Addendum at page 5)

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[1] *Lewis v. United States*, 445 U.S. 55, 67 (1980) (Supreme Court held that uncounseled convictions are not invalid for all purposes, recognizing a class of persons who could not possess firearms regardless of whether their convictions preventing them from possessing firearms were counseled or uncounseled. Enforcement of the federal firearm laws was just that–enforcement. Being unable to possess a firearm was a "civil disability.").

[2] *United States v. First*, 731 F.3d 998 (9th Cir. 2013) (The Ninth Circuit followed the reasoning in *Lewis*, holding that the defendant's misdemeanor domestic violence conviction in tribal court, which was obtained in violation of his Sixth Amendment right to counsel, did not affect the Government's use of that conviction in a subsequent federal firearms prosecution. This was true because the focus of the Government's federal firearms prosecution was not on the prior conviction as an element of the offense. It was on the person possessing an item he was not legally supposed to possess.).

5. Contrary to Petitioner's assertions, nowhere in the *Bryant* decision does the Ninth Circuit hold "the Constitution prohibited reliance on respondent's *valid* uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element." *See* Pet. at page 2 (emphasis added). Rather, the Ninth Circuit's holding reiterates that if an individual is subject to incarceration for his offenses, if given counsel, the tribal court convictions may be used to establish the predicate-offense element in federal court under a subsequent §117(a) prosecution. Otherwise, the tribal court convictions, as with Respondent, are invalid because they are uncounseled. *See Bryant*, 769 F.3d at 677 (Addendum at page 5). Later in the petition, even Petitioner agrees this is the holding in *Bryant*. *See* Pet. at page 5, 3.a.

6. Respondent acknowledges the absence of counsel guaranteed by the Sixth Amendment in tribal court results from the Indian Civil Rights Act (ICRA). *See* 25 U.S.C. §1302(a)(6). Respondent did not contend his tribal court convictions were unconstitutional. *Bryant*, 769 F.3d at 673 (Addendum at pages 3). Rather, he argued the uncounseled tribal court convictions were invalid and unconstitutional when used in federal court to prove an element required in a federal prosecution. Id.

7. Use of the tribal court convictions in federal court triggers the protections of the United States Constitution. Petitioner states that "[i]t is undisputed . . . those [tribal court] convictions are valid and were obtained in compliance with

ICRA." Pet. at page 4, 2.a. Respondent has disputed and continues to dispute the validity of uncounseled tribal court convictions when used in federal court to prove an element of the prosecution.

8. Judge Watford wrote separately, concurring with the *Bryant* decision, but indicating his belief that this Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994) called the Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) into question. *Bryant*, 769 F.3d at 679 (Addendum at page 6). Judge Watford posited *Nichols* undercut the proposition that uncounseled convictions were categorically unreliable. As such, the seemingly contrary holding in *Ant* was difficult to "square with" the notion Respondent's prior convictions were not obtained in violation of the Sixth Amendment since they occurred in tribal court. *Id.* Citing *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), Judge Watford continued the Sixth Amendment could not be violated anew if it never first was violated. *Id.*

9. Petitioner filed a petition for rehearing en banc and Respondent answered. (Addendum at pages 9-48; 49-86, respectively.) The Ninth Circuit denied the petition for rehearing, explaining why *Bryant* does not apply the bright-line reading of *Nichols* advocated by the dissenters. *See United States v. Bryant* [*Bryant Order*], 792 F.3d 1042, 1043-1046 (Addendum at pages 87-89). That reading, according to the dissenters, permits the use of tribal court convictions in subsequent

federal prosecutions because tribal court convictions never violate the Sixth Amendment. *See Bryant Order*, 792 at 1046-1050 (Addendum at pages 89-92).

10. The Ninth Circuit explained "[t]he most salient difference between the guilt and punishment phases of criminal adjudication is that prosecutors must prove each element of an offense beyond a reasonable doubt." *Bryant Order*, 792 at 1043 (citing *In re Winship*, 397 U.S. 358 (1970)) (Addendum at page 87). Hence, "[n]othing in *Nichols* purports to sanction the use of an uncounseled conviction for *Winship* purposes." *Id.* Also, "*Nichols* does not hold that an uncounseled conviction is sufficiently reliable to support a conviction in a future prosecution where, as in *Bryant* and *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), these accommodations are absent." *Bryant Order*, 792 at 1043 (Addendum at page 88).

11. Finally, while "[n]o part of the decision in *Bryant* is intended to express contempt for tribal courts," "[n]or does the decision frustrate the purpose of §117(a)," the Ninth Circuit concluded that the *Bryant* decision "is consistent with Congress's dual interest in respecting tribal courts and ensuring due process for tribal court defendants." *Bryant Order*, 792 F.3d at 1044 (Addendum at page 88).

REASONS FOR DENYING THE PETITION

Petitioner's certiorari petition equates ICRA to the United States Constitution, contending that tribal court convictions obtained without the assistance of counsel are constitutionally valid when used in federal court.

Respondent's tribal court convictions were not validly entered under federal law. The protections of the United States attach to a prosecution in federal court and to evidence necessary for that prosecution. *See Custis v. United States*, 511 U.S. 485, 497 (1994) (denial of counsel is the only exception to the ban on collateral attacks of prior convictions used to invoke the enhancement provisions of the Armed Career Criminal Act). The Ninth Circuit's holding is correct under federal law, provides constitutional checks the Eighth and Tenth circuit court decisions do not, and does not eliminate prosecutions under 18 U.S.C. §117(a).

A. The Ninth Circuit's holding is premised on sound circuit precedent as well as sound analysis of this Court's precedent.

When Respondent's tribal court convictions were used by Petitioner in an attempt to prove an element of the offense, those convictions must have been obtained in accordance with the Sixth Amendment. The holding in *Nichols* actually supports that proposition. Given Respondent's tribal court convictions were uncounseled, they were not validly entered under federal law.

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution dictates a fair trial is one where evidence that is subject to adversarial testing is presented to an impartial tribunal for resolution of elements defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards are essential to the criminal justice system. The right to counsel is one of those safeguards.

In 1963, this Court held that the United States Constitution requires appointment of counsel for all indigent defendants charged with any felony. *Gideon v. Wainright*, 372 U.S. 335, 342-43 (1963). That right was extended at the state level where a defendant must be appointed counsel if the defendant's criminal charge carried with it the possibility of incarceration. *Argersinger v. Hamlin*, 407 U.S. 25, 37-38, 40 (1972). An indigent defendant who is charged with a misdemeanor offense and who receives a sentence of imprisonment is entitled to counsel under the Sixth Amendment to the United States Constitution. *Scott v. Illinois*, 440 U.S. 367, 374 (1979).

Respondent was incarcerated as the result of some of his tribal court convictions and he did not receive counsel during the proceedings on those tribal court convictions. Under *Scott*, Respondent should have had counsel during the

proceedings that led to his convictions since those proceedings led to the deprivation of his liberty. *Scott*, 440 U.S. at 373-74.

Respondent did not have counsel because "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citation omitted). Tribes remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). They have the power to make their own substantive law in internal matters. *See Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations). They also have the power to enforce the law in their own forums. *See e.g., Williams v. Lee*, 358 U.S. 217 (1959).

In *Talton v. Mayes*, 163 U.S. 376 (1896), this Court held the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by tribes. Respondent has consistently acknowledged that tribes are distinct and that ICRA contains rights that are similar, but not identical to, the United States Constitution. In fact, Respondent acknowledges if the tribal court prosecuted him in tribal court for being an habitual offender, his two prior tribal court convictions would be valid for subsequent prosecution in tribal court.

The moment, however, Petitioner brought Respondent's case into federal court in an attempt to prove he was an habitual offender under a federal statute–§117(a)–based on his tribal court convictions, the United States Constitution applied to that prosecution. That prosecution involved Petitioner proving: (1) Respondent was a person who had committed a domestic assault within United States jurisdiction or Indian country; and (2) Respondent had been at least twice previously convicted "in Federal, State, or Indian tribal court" of "any assault, sexual abuse, or serious violent felony against a spouse or intimate partner[.]" 18 U.S.C. §117(a).

Petitioner cannot prove in federal court beyond a reasonable doubt that Respondent had two prior convictions when those two prior tribal court convictions were obtained without counsel. Those prior tribal court convictions are not valid in federal court because they were uncounseled. That they were obtained in tribal court in accordance with ICRA does not change their constitutional invalidity in federal court.

Congress enacted ICRA to afford the "individual Indian protection of his rights as a citizen in the face of tribal practices." *See* The Constitutional Rights of the American Indian: Hearings before the United States Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Eighty-Seventh Congress, first session (1961 Hearings), Part I at 6. ICRA established ten enumerated rights.

Congress did not require the right to court appointed counsel. 25 U.S.C. §1302. The Bureau of Indian Affairs actually opposed creating a right to defense counsel at tribal expense, because doing so would be costly and would create an imbalance. *See* 1961 Hearings, Part 1 at 13. Tribes were not usually represented and tribal court judges were not always legally trained. *Id.* at 8-9.

While ICRA may have meant to protect Indian defendants from arbitrary and unjust actions, without counsel Government actions such as those taken against Respondent will remain unchecked. *See Santa Clara Pueblo*, 436 U.S. at 61 (quotation omitted). That is, tribal defendants like Respondent will proceed, uncounseled, with the charges against them in tribal court without appreciating the penalties and disabilities their uncounseled convictions will subject them to. It is very plausible that a defendant in tribal court would plead guilty to simply get out of jail without understanding that the guilty plea is a predicate under §117(a). Habeas corpus relief also does not avail these concerns because that, too, is a right rendered virtually meaningless without the benefit of counsel[3]. *See* Pet. at page 19.

Petitioner argues that "nothing in the Constitution prohibits Congress's judgment" that prior uncounseled (and counseled) tribal convictions may be used to

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[3]25 U.S.C. §1303. "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

"support a recidivist prosecution under Section 117(a)." Pet. at page 12. Petitioner also contends that "even if the defendant was not counseled, no principle in this Court's jurisprudence is undermined." Pet. at page 15. When Petitioner sought to prosecute Respondent in federal court based on two uncounseled tribal court convictions for which he was incarcerated, the Sixth Amendment to the United States Constitution applied and was undermined. Sixth Amendment jurisprudence, therefore, limits Congress's judgment regarding §117(a).

The rights Indians enjoy as United States citizens under the United States Constitution differ from their civil rights under ICRA. The holding in *Nichols* does not change that fact, which is why this Court need grant certiorari.

Under *Nichols*, a valid misdemeanor conviction is one that complies with the Sixth Amendment. *Nichols*, 511 U.S. at 748-49. The defendant's conviction at issue in *Nichols* comported with the Sixth Amendment because the defendant in that case did not receive a sentence of incarceration. *Id.* at 740. Hence, the defendant in *Nichols* need not under *Scott* be appointed counsel. *Id.* at 748-49. The defendant's sentence in *Nichols* was thereby properly enhanced using the prior uncounseled misdemeanor conviction to do so. *Id.*

Judge Watford indicated in his concurrence to the *Bryant* decision that "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional

violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Bryant*, 769 F.3d at 679 (Watford, J. concurring) (Addendum at page 6). Respondent's convictions were tainted by a constitutional violation, however. In being used as evidence to prove an element to a federal criminal offense in federal court, they do not comport with the Sixth Amendment because the convictions were uncounseled.

Nichols does not undercut the proposition that uncounseled convictions are categorically unreliable. *See* Pet. at page 7. Rather, as the concurrence acknowledged in *Nichols*, reliability concerns still exist regarding uncounseled convictions; however, those concerns are "accommodated" because a defendant may "convince the sentencing court of the unreliability of any prior valid but uncounseled convictions. *Nichols*, 511 U.S. at 752 (Souter J., concurring in judgment). Also, the burden of proof is less, which equates to a less stringent reliability requirement. *See Nichols*, 511 U.S. at 747.

This Court in *Scott* relied on *Argersinger* drawing a bright line between imprisonment and lesser criminal penalties on the theory that concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of liberty. *See Scott*, 440 U.S. at 372-73; *see also Argersinger*, 407 U.S. at 34-37. Enhancement or recidivist statutes "do not change the penalty imposed for

the earlier conviction." *Nichols*, 511 U.S. at 747. Repeat-offender laws are instead sustained because they penalize "only the last offense committed by the defendant." *Id.*

That is not the case where, as here, an uncounseled misdemeanor conviction is used as evidence to establish guilt of an offense. The enhancement or recidivist statute relies on the fact a conviction exists. If a conviction does not exist–because it is invalid–there can be no statutory crime. Stated another way, prosecution of Respondent in federal court under §117(a) changes the earlier tribal court convictions. They no longer exist because they are no longer valid. Unlike sentencing enhancement or recidivist statutes which penalize the last offense, prosecution under §117(a) in federal court hinges on the existence of two prior tribal court convictions to establish a crime even occurred. The prosecution cannot exist without the two prior convictions.

Petitioner argues that "Respondent should not be protected against the use of his tribal criminal record based on the sentence he received in tribal court, when that sentence has no relevance to the use of the conviction as a predicate under Section 117(a)." Pet. at page 15. Petitioner continues, arguing "nothing in logic supports allowing the government to rely on a tribal-court misdemeanor conviction when the tribal court imposed only a fine, but barring it from using the same conviction if the

tribal court imposed imprisonment, when nothing in the federal recidivist prosecution turns on the sentence received in tribal court." Pet. at page 16.

Respondent is not protected against use of his tribal court convictions based on the sentences he received. The fact he was incarcerated meant he was entitled to counsel under *Scott* when Petitioner sought to prosecute Respondent in federal court using the tribal court convictions as evidence of his guilt. Since he did not have counsel, those convictions in the federal prosecution were invalid as violating the Sixth Amendment. Hence, the sentences Respondent received in tribal court are not what drove the Ninth Circuit's analysis in *Bryant*. The constitutional protections provided under the Sixth Amendment are.

Petitioner desires this Court to use Respondent's prior tribal court convictions as evidence to prove an element of a crime when those same tribal court convictions, upon sentencing, would be subject to further scrutiny and possibly not applied to enhance Respondent's sentence given their unreliability.

Indeed, USSG §4A1.2 discusses the use of prior sentences in increasing a term of imprisonment, indicating those sentences will not count if they result from tribal court convictions. The Sentencing Guidelines count a prior uncounseled conviction misdemeanor only "where imprisonment was not imposed." USSG §4A1.2, Comment. Background; *United States v. Ortega*, 94 F.3d 764, 771 (2d Cir. 1996)

(§4A1.2 "excludes from criminal history computations all uncounseled misdemeanor sentences of imprisonment"). While the Sentencing Guidelines do not allow criminal history points to be assessed for tribal court convictions, they do allow a district court to find a criminal history score is understated because of a significant tribal court record. *See* USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Petitioner points to Judge O'Scannlain's statement that "the court's [Ninth Circuit] argument is illogical" since Nichols' and Respondent's uncounseled convictions "comport" with the Sixth Amendment for the same reason–that being the Sixth Amendment did not apply to either conviction. Pet. at page 16 (citing to *Bryant Order*, 792 F.3d at 1048 (Addendum at page 91). Remembering that *Nichols* is a punishment case and this case is a guilt phase case is essential as pointed out by Judge Paez. *Bryant Order*, 792 F.3d at 1043 (Addendum at page 87).

Additionally, Nichols' case and Respondent's case are not identical because even if this case was a punishment case, Respondent's uncounseled tribal court convictions could not be used to assess criminal history points under the United States Sentencing Guidelines. USSG §4A1.2. What seems illogical is the argument that Respondent's uncounseled tribal court convictions cannot be counted to assess

criminal history points for the advisory Sentencing Guidelines yet can be used to establish an essential element at the guilt phase in federal court.

The Government is held to a higher burden when proving a crime, yet Petitioner's approach appears to equate its burden to the less exacting standard required at sentencing, stating the "procedural difference [of proving the prior tribal convictions beyond a reasonable doubt] does not alter the substantive use of the conviction to demonstrate that the defendant is a repeat offender." Pet. at page 18.

Petitioner has stated that this is a federal recidivist prosecution. Pet. at page 16. Respondent disagrees with that assertion. Clearly, all agree that uncounseled tribal court convictions would have violated the Sixth Amendment had they been obtained in state or federal court. As applied to Respondent, it is illogical to assume his case is a federal recidivist prosecution when the previous recidivist behavior does not comport with the Sixth Amendment at the guilt phase. In other words, how can §117(a) be deemed a recidivist prosecution when the Government could have not prosecuted Respondent before in federal court due to the Sixth Amendment violations that occurred in tribal court? His behavior should not be deemed repeat behavior, under a true recidivist statute, when the rules are not the same.

As the Ninth Circuit indicated in denying Petitioner's petition for rehearing en banc, *Nichols* leaves open the question "whether a potentially unreliable uncounseled

misdemeanor conviction passes muster at the guilt phase." *Bryant Order*, 792 F.3d at 1043 (Addendum at page 88). The Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) "fills this gap" and does so correctly. *Id. Ant* holds that the Government may not use prior tribal court misdemeanor convictions as evidence of guilt in subsequent federal prosecutions where those prior convictions were obtained in violation of the defendants' Sixth Amendment right to counsel. *Ant*, 882 F.2d at 1396.

The Ninth Circuit in *Ant* closely considered the possibility that uncounseled proceedings may contribute to a defendant's misunderstanding or confusion. *See Ant*, 882 F.2d at 1394. The Ninth Circuit in *Ant* also highlighted genuine concerns for judicial accuracy *See Ant*, 882 F.2d at 1394, 1396. *Ant* did not rely on *Baldasar v. Illinois*, 446 U.S. 222 (1980) in ultimately holding that the defendant's guilty plea, which was constitutionally infirm if obtained in federal court, was inadmissible in a subsequent federal prosecution. In fact, *Ant* made only a passing citation to *Baldasar* in the overarching discussion of an individual's Sixth Amendment right to counsel at the time the person pleads guilty. *See Ant*, 882 F.2d at 1394. That *Nichols* overruled *Baldasar* had no effect on *Ant* or *Bryant*. The rationale of *Ant* and *Bryant* still remain.

That is, the *Ant* and *Bryant* decisions evaluated whether the plea and the tribal court convictions, respectively, met "the requirements of the United States Constitution for use in a federal prosecution in federal court." *Ant*, 882 F.2d at 1396. They "looked beyond the validity of the tribal conviction itself and . . . reviewed the actual tribal proceedings to determine if they were in conformity with the Constitutional requirements for federal prosecutions in federal court." *Id.*

Accordingly, where a person is not given the opportunity to have appointed counsel–thereby making that person unaware that either the tribal guilty plea (in *Ant*) or the tribal court conviction (in *Bryant*) would be used against him in future federal court prosecutions–the guilty plea or conviction is not admissible in a subsequent federal prosecution. The Sixth Amendment right to counsel "d[oes] not obtain" in tribal court proceedings. *Nichols*, 511 U.S. at 746. Respondent's §117(a) proceeding was in federal court, however, where the Sixth Amendment right to counsel does obtain.

> [The Sixth Amendment right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer–to the untrained layman–may appear intricate, complex, and mysterious[.] . . .

> The 'right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

Indian defendants are citizens of the United States as well. The deprivation of counsel in tribal court does not serve to protect Indian tribes. Should this Court accept Petitioner's argument, deprivation of counsel in federal court will be endorsed. This Court should reject Petitioner's request to twist and configure the United States Constitution in a manner so as to further a statutory purpose that does not square with a core provision of the Constitution.

B. Congress could not rationally conclude that uncounseled convictions used in a subsequent federal prosecution as evidence of guilt were reliable.

The *Bryant* decision was not decided under the Due Process clause, nor was the *Bryant* Order denying the petition for rehearing. This Court should therefore reject any attempt by Petitioner to grant certiorari under a constitutional provision not

addressed by the Ninth Circuit. *See Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been its considered practice [in the United States Supreme Court] not . . . to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") (citations omitted).

In the alternative, Petitioner argues "Congress could rationally conclude that appointed counsel is not essential to an accurate determination of guilt in tribal-court misdemeanor proceedings, particularly in light of the other procedural protections that help ensure the reliability of tribal-court convictions." (Pet. at page 19.) Petitioner makes this assertion but does not indicate what these "other procedural protections" contained in ICRA are, and more importantly, how they ensure reliability above and beyond the Fifth and Sixth Amendments of the United States Constitution.

Indeed, as it applies to tribal court matters, Congress agrees the procedural safeguards of the criminal justice system under the United States Constitution are essential as evidenced by Congress enacting the Tribal Law and Order Act in 2010. *See* 25 U.S.C. §1302.

The Tribal Law and Order Act expanded the tribal sentencing authority for certain tribal court cases (where the tribe imposes a term of imprisonment of more than one year) provided the tribe actually secures certain rights to the tribal court defendants. Those rights include:

> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
>
> (3) require that the judge presiding over the criminal proceeding–
>
> (A) has sufficient legal training to preside over criminal proceedings; and
>
> (B) is licensed to practice law by any jurisdiction in the United States;
>
> (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
>
> (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

25 U.S.C. §1302(c).

Since Congress appreciates the need for counsel and due process when a person is imprisoned for greater than one year, it cannot be said that in the interest of prosecuting habitual offenders under §117(a) for what Petitioner purports to be a serious epidemic it is rational not to provide domestic violence offenders counsel in tribal court. Rather, it appears that Congress has indicated a problem exists, yet has failed to account for the fact §117(a) prosecutions occur in federal court where the United States Constitution applies.

Respondent received a sentence of forty-six months–significantly more than one year. As stated above, Congress certainly has acknowledged the importance of effective assistance of counsel by passing the Tribal Law and Order Act of 2010 requiring that an indigent defendant receive appointed counsel when a sentence of over year is imposed. 25 U.S.C. § 1302(c)(2). Therefore, any conviction obtained pursuant to §117(a) should require all essential offense elements comply with the Sixth Amendment. Arguing that ICRA does not require compliance with the Sixth Amendment should not be an out.

Respondent's convictions raise reliability concerns for the reasons already addressed in Section A. Congress may "make a tribal misdemeanor conviction an element of a recidivist domestic-violence crime," as it has done under §117(a). (Pet. at pages 16-17). In application in federal court, however, where a prosecutor seeks

to use a misdemeanor conviction as evidence of that element and the conviction violates the Sixth Amendment, the determination made by Congress cannot be deemed rationale.

C. Other circuit decisions do not provide the constitutional checks that the Ninth Circuit's decision does.

The Ninth Circuit recognized the circuit split its *Bryant* decision caused. *Bryant*, 769 F.3d at 678 (Addendum at page 5). However, the *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011) and *Shavanaux* decisions fail to acknowledge the dual rights that every individual Indian holds: the rights of a United States citizen under the United States Constitution (Const. amend VI) and the distinct rights as a tribal citizen under ICRA (25 U.S.C. §1302). Moreover, those cases were not decided en banc and can be further resolved in their own circuits. This Court did not grant certiorari in either of those cases.

The *Cavanaugh* and *Shavanaux* courts overlooked the importance of attorney representation in tribal court. Instead, those courts have automatically accepted the validity of prior uncounseled tribal court convictions as they apply to domestic violence assaults. The accuracy of prior convictions cannot be ensured without constitutional checks from the federal system–the very constitutional checks that *Ant* applied.

The *Cavanaugh* and *Shavanaux* decisions encroach on tribal sovereignty as well. In an interesting twist to tribal sovereignty concerns by the dissenters, the holdings in *Cavanaugh* and *Shavanaux* give federal courts more authority. Section 117(a) allows the United States Attorneys' office to assert more authority in the area of domestic violence in Indian country. Without proper deference to a person's fundamental right to counsel in federal court, federal prosecutors under the *Cavanaugh* and *Shavanaux* reasoning need not hesitate prosecuting any habitual domestic violence offender. This usurps the authority–and sovereignty–afforded tribal courts under 25 U.S.C. §1304(b) and (c).

Finally, had domestic violence concerns not underscored the courts' reasoning in *Cavanaugh* and *Shavanaux*, can it be said that the holdings would have been the same? Or, would the resulting decisions been in line with *Ant*? As stated above, domestic violence in Indian Country is a legitimate concern. However, the statute enacted to address the issue must comply with the Sixth Amendment.

D. Section 117(a) is not invalidated by *Bryant*.

The *Bryant* decision does not prevent the Government from prosecuting under §117(a). The *Bryant* decision only prevents the Government from prosecuting under §117(a) when the Government seeks to use prior convictions that were obtained in violation of the Sixth Amendment. In addition, 25 U.S.C. §1304(d)(4) requires a

defendant to receive "all other rights whose protection is necessary under the Constitution of the United States," including the right to court-appointed counsel. Any concerns about *Ant* and *Bryant* all but writing §117(a) off the books is availed by §1304. *See* Pet. at pages 26-27.

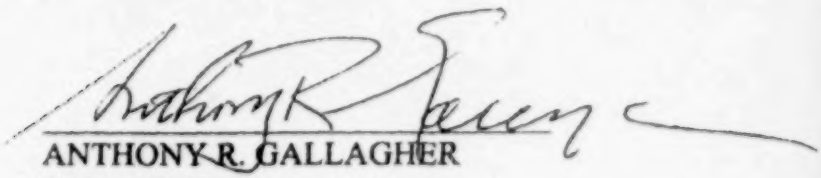
The *Bryant* decision does not condone domestic violence. But where, as here, the statute that was drafted to address domestic violence concerns runs afoul of the United States Constitution in its application, this Court should not be asked to cure the statute with legal gymnastics. If a portion of a statute is unconstitutional it must be changed. That is the job of Congress.

Section 117(a) has been utilized to achieve a legislative goal. It was developed to combat a serious problem with domestic violence in tribal communities. *See* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain). The pursuit of justice under §117(a) by Petitioner, however, should not be a pursuit of effortless conviction. Rather, the solution to the issue presented in Petitioner's petition for a writ of certiorari is to amend ICRA, expanding attorney representation to matters Congress has already deemed serious–namely, domestic violence proceedings in tribal court.

CONCLUSION

WHEREFORE, this Court should deny Petitioner's petition for writ of certiorari.

Respectfully submitted,



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No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Ninth Circuit in this case—over the dissent of eight judges from the denial of rehearing en banc (Pet. App. 40a-54a)—held that 18 U.S.C. 117(a) is unconstitutional as applied to recidivist domestic-violence offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. Respondent agrees that the Ninth Circuit's decision creates a circuit conflict, and he does not dispute that the issue is important. Respondent nevertheless contends (Br. in Opp. 9-26) that this Court should deny the petition for a writ of certiorari because, in his view, the Ninth Circuit's decision is correct. But respondent's effort to defend the decision lacks merit and provides no basis for denying review. The petition for a writ of certiorari should be granted.

1. Respondent acknowledges (Br. in Opp. 26-27) that the Ninth Circuit's decision in this case conflicts with decisions of the Eighth and Tenth Circuits. See *United States* v. *Cavanaugh*, 643 F.3d 592 (8th Cir.

2011), cert. denied, 132 S. Ct. 1542 (2012); *United States* v. *Shavanaux*, 647 F.3d 993 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012). Because the vast majority of federally recognized tribes are located in the three circuits that have considered the question presented, Section 117(a)'s applicability to habitual offenders with uncounseled tribal-court misdemeanor convictions that resulted in imprisonment will differ based on the geographical happenstance of the circuit in which the offenders reside. See Pet. 24. Respondent nevertheless argues that the division in authority could resolve itself because the cases in the Eighth and Tenth Circuits "were not decided en banc." Br. in Opp. 26. That argument is unavailing.

Respondent offers no reason to believe that the Eighth and Tenth Circuits will reconsider their decisions holding that Section 117(a) may constitutionally be applied to defendants with prior uncounseled tribal-court misdemeanor convictions. Indeed, in upholding Section 117(a) as applied to those offenders, *Shavanaux* and *Cavanaugh* expressly disagreed with the Ninth Circuit's analysis in *United States* v. *Ant*, 882 F.2d 1389 (1989), which held that an uncounseled tribal-court guilty plea that resulted in imprisonment is inadmissible in a federal prosecution arising out of the same incident. *Id.* at 1395; see Pet. App. 15a n.6 (noting that "both the Eighth Circuit and the Tenth Circuit recognized that their holdings were at odds with *Ant*"). The Tenth Circuit rejected "*Ant*'s threshold determination that an uncounseled tribal conviction is constitutionally infirm" because "the Bill of Rights does not constrain Indian tribes." *Shavanaux*, 647 F.3d at 997-998. Similarly, the Eighth Circuit disagreed with *Ant*'s rationale that "prior tribal court

proceedings should be *treated* as involving constitutional violations where a similar absence of counsel would have violated the Sixth Amendment had it occurred in federal or state court." *Cavanaugh*, 643 F.3d at 604. Instead, the Eighth Circuit declined to "preclude the use of such a conviction in the absence of an actual constitutional violation." *Id.* at 605.

The defendants in *Shavanaux* and *Cavanaugh* sought rehearing en banc, urging the courts of appeals to reconsider their holdings and follow the Ninth Circuit's approach in *Ant*. See Pet. for Reh'g En Banc 2-3, 7, 10, 12, *Shavanaux*, *supra*, No. 10-4178 (Aug. 16, 2011); Pet. for Reh'g, With Suggestion for Reh'g En Banc 8-10, *Cavanaugh*, *supra*, No. 10-1154 (July 20, 2011). But the Eighth and Tenth Circuits denied the petitions for rehearing en banc with no recorded dissent. See Order, *Shavanaux*, *supra* (Sept. 8, 2011); Order, *Cavanaugh*, *supra* (Aug. 12, 2011). There is accordingly little chance those courts will revisit their precedent in light of the Ninth Circuit's decision in this case, which reaffirmed "*Ant*'s continued vitality" and deemed it binding on the question of Section 117(a)'s constitutionality. Pet. App. 15a-16a.

Moreover, respondent ignores the conflict between the Ninth Circuit's decision and cases holding that an uncounseled misdemeanor conviction may be relied upon in a subsequent prosecution, even if the prior conviction impermissibly resulted in a sentence of imprisonment. See Pet. 22-23. Judge Owens emphasized that the Ninth Circuit panel in this case "split[] with every circuit to seriously consider this issue." Pet. App. 41a. Because these circuit conflicts will persist until this Court intervenes, further review is warranted.

2. Respondent does not dispute that the issue presented here is important and recurring. As respondent acknowledges (Br. in Opp. 27-28), Section 117(a) "was developed to combat a serious problem with domestic violence in tribal communities," which respondent agrees is "a legitimate concern." The facts of this case well illustrate the problem: Respondent repeatedly assaulted his intimate partners on tribal land, yet he received only misdemeanor-level punishment again and again. As Judge Owens observed:

> [Respondent] likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out. Although his violence varies, his punishment never does. Despite [respondent's] brutality—resulting in seven convictions for domestic violence—his worst sentence was a slap on the wrist * * * .

Pet. App. 40a.

The cycle of violence perpetrated by respondent is unfortunately not unique. "American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women." Br. of Nat'l Congress of American Indians as Amicus Curiae 2; see *id.* at 4-8 (summarizing statistics); Pet. 24-25 (same). Until Section 117(a) was enacted, however, it was frequently difficult to charge Indian habitual offenders with a felony. See Pet. 25. Accordingly, "[t]here are many, many men like [respondent]," who have multiple uncounseled tribal-court misdemeanor convictions for domestic violence—"[a]nd

there are even more victims of men like [respondent]." Pet. App. 40a (Owens, J., dissenting from denial of rehearing en banc). Because the Ninth Circuit's decision frustrates Congress's effort to combat domestic violence on tribal lands by invalidating Section 117(a) as applied to those repeat offenders if their prior convictions resulted in imprisonment, this Court's review is warranted.[1]

3. Respondent devotes his brief in opposition primarily to defending the decision below on the merits. Br. in Opp. 9-26. In general, respondent's arguments paraphrase the Ninth Circuit's reasoning, and as the government explained in the petition, that reasoning is erroneous. See Pet. 12-16.

The principal flaw in respondent's argument is his contention (Br. in Opp. 16) that tribal-court convictions have a chameleon-like quality. Respondent acknowledges that his tribal-court convictions did not violate the Constitution or the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, when they were

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[1] Respondent argues (Br. in Opp. 28) that "[a]ny concerns about * * * writing § 117(a) off the books is availed by [25 U.S.C.] 1304," which recognizes the inherent power of tribes "to exercise special domestic violence criminal jurisdiction" and requires tribes to provide certain procedural protections when exercising that authority. 25 U.S.C. 1304(b)(1) and (d). But the statute defines "special domestic violence criminal jurisdiction" to "mean[] the criminal jurisdiction that a participating tribe may exercise under this section *but could not otherwise exercise*." 25 U.S.C. 1304(a)(6) (emphasis added). Because the "powers of self-government" possessed by Indian tribes "include[] the inherent power * * * to exercise criminal jurisdiction over all Indians," 25 U.S.C. 1301(2), Section 1304 generally has no application to Indians, like respondent, who commit repeated acts of domestic violence on tribal land.

obtained, and that the convictions were valid for purposes of imposing punishment in the tribal proceedings. See Br. in Opp. 6. And respondent has not otherwise challenged the validity or reliability of his domestic-violence convictions through a writ of habeas corpus in federal court or through further proceedings in tribal court. Indeed, respondent accepts that, if he were prosecuted as a habitual offender in tribal court, his prior convictions for domestic violence "would be valid" in a subsequent tribal proceeding. *Id.* at 11. Yet respondent maintains that his "prosecution * * * in federal court under § 117(a) changes the earlier tribal court convictions," making them "no longer exist" because, in respondent's view, "they are no longer valid." *Id.* at 16.[2]

Respondent's argument resurrects the (now overruled) result in *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), which held that an uncounseled state-court misdemeanor conviction that was constitutionally valid because no term of imprisonment was imposed could not be used to classify the offender as a recidivist in a subsequent prosecution. *Id.* at 222-224. Dissenting in *Baldasar*, Justice Powell observed that the Court's ruling was "analytically unsound" because it "create[d] a special class of uncounseled misde-

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[2] Respondent's purported concern (Br. in Opp. 27) about preserving tribal sovereignty rings hollow in light of his suggestion that uncounseled tribal-court convictions should be treated as though they do not exist. See Pet. App. 20a (Watford, J., concurring) (observing that this result "denigrat[es] the integrity of tribal courts"); see also Br. of Nat'l Congress of American Indians as Amicus Curiae 16-17 (urging this Court to grant review of the Ninth Circuit's decision because it "undermines the delicate balance Congress has struck between tribal sovereignty and defendants' rights").

meanor convictions" that "are valid for the purposes of their own penalties" but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232, 234 (Powell, J., dissenting). Justice Powell's analysis was vindicated when this Court overruled *Baldasar* in *Nichols* v. *United States*, 511 U.S. 738 (1994). *Nichols* held that "an uncounseled misdemeanor conviction" that is "valid * * * because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748-749. The Court should take this occasion to reject respondent's argument and reaffirm *Nichols*' rule that a conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used in a subsequent prosecution.

Respondent attempts to supplement the Ninth Circuit's reasoning (Br. in Opp. 19) by disputing that "his case is a federal recidivist prosecution" at all. Respondent asserts (*id.* at 16) that "[u]nlike sentencing enhancement or recidivist statutes which penalize the last offense, prosecution under § 117(a) in federal court hinges on the existence of two prior tribal court convictions to establish a crime even occurred." But Section 117—which is titled "Domestic assault by *an habitual offender*"—is violated only when a person who has two prior domestic-violence convictions "commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country." 18 U.S.C. 117(a) (emphasis added). The statute clearly penalizes the last offense, and relies on the fact of the prior convictions to identify the class of offenders who should be subject to that penalty. Section 117(a) accordingly fits comfortably

within the long line of this Court's precedents holding that recidivist statutes do not impose additional punishment for prior crimes, but rather provide "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); see, *e.g.*, *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912) (recognizing that repeat offenders "are not punished the second time for the earlier offense," but instead "the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted").

Respondent further suggests (Br. in Opp. 15, 25) "that uncounseled convictions are categorically unreliable."[3] That argument is hard to square with respondent's concession (*id.* at 11) that his prior convictions are reliable enough to permit his prosecution as a repeat offender in tribal court. Respondent also

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[3] Respondent observes (Br. in Opp. 25) that Congress enhanced the sentencing authority of tribes in 2010 but required them to provide appointed counsel if they sentence a defendant to a term of incarceration exceeding one year. See 25 U.S.C. 1302(c); Pet. 25 n.5. By not extending the same right to appointed counsel when a tribal-court defendant faces only misdemeanor punishment, including a term of imprisonment of one year or less, Congress reaffirmed its judgment that counsel is not necessary in that circumstance—particularly given the other procedural protections conferred by ICRA. See Pet. 2-3, 19 (summarizing relevant provisions); Br. of Nat'l Congress of American Indians as Amicus Curiae 12-15. It is undisputed that respondent's tribal-court sentences for domestic violence never exceeded one year. See Pet. 4; Pet. App. 40a (Owens, J., dissenting from denial of rehearing en banc). Respondent states (Br. in Opp. 25) that he "received a sentence of forty-six months—significantly more than one year." But that was the sentence for his convictions under Section 117(a), and respondent had appointed counsel in the federal proceeding.

appears to acknowledge (*id.* at 10-11) that uncounseled tribal-court misdemeanor convictions may serve as predicate offenses for a Section 117(a) prosecution so long as the tribal court did not impose a term of incarceration, but he does not explain why the tribal court's sentencing determination would make those convictions any more or less reliable.[4]

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[4] Respondent argues (Br. in Opp. 18-19) that it would be "illogical" to rely on his uncounseled tribal-court convictions in a prosecution under Section 117(a) because the Sentencing Guidelines do not assign criminal-history points based on tribal offenses. See Sentencing Guidelines § 4A1.2(i). As respondent recognizes, however, the Guidelines further provide that tribal convictions may form the basis for an upward departure when the calculated criminal-history category is inadequate. See Sentencing Guidelines § 4A1.3(a)(2)(A); see also, *e.g.*, *United States* v. *Lonjose*, 42 Fed. Appx. 177, 180 (10th Cir.) (observing that "the consideration of * * * tribal court convictions is generally encouraged" under the Guidelines), cert. denied, 537 U.S. 984 (2002); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 436 (2004) ("Despite the general rarity of upward departures, federal judges have often used the existence of a lengthy tribal criminal history to justify an upward departure in Indian country cases.") (footnote omitted).

In any event, Section 4A1.2(i) of the Guidelines applies even if an uncounseled tribal-court conviction did not result in imprisonment, and it also applies when a tribal-court defendant has appointed counsel in the tribal proceedings. In both of those circumstances, respondent acknowledges that the tribal-court conviction may be relied upon to satisfy Section 117(a)'s predicate-offense element, even though the tribal offense would not be counted under the Guidelines in calculating the defendant's criminal-history category at sentencing. More fundamentally, Congress is not bound by the United States Sentencing Commission's approach to tribal-court convictions, and the Guidelines certainly fall short of establishing that Congress acted irrationally in permitting tribal-court convictions to serve as predicate offenses in a Section 117(a) prosecution. See *Lewis* v. *United States*, 445 U.S. 55, 65 (1980).

Respondent also asserts (Br. in Opp. 13) that uncounseled tribal-court defendants may not "appreciat[e] the penalties and disabilities their uncounseled convictions will subject them to." But the same argument was made and rejected in *Nichols*, which declined to find that "due process requires an [uncounseled] misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime." 511 U.S. at 748. The *Nichols* Court reasoned that a warning that the defendant "will be treated more harshly" if "he is brought back into court on another charge * * * would merely tell him what he must surely already know." *Ibid.* Respondent's knowledge that he had multiple domestic-violence convictions in tribal court should have "serve[d] as an incentive not to commit a subsequent crime and risk" being classified as a recidivist. *Daniels* v. *United States*, 532 U.S. 374, 381 n.1 (2001). Because respondent instead chose to continue assaulting his domestic partners, he should not be heard to complain that his actions exposed him to prosecution under Section 117(a).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2015

No. 15-420

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL BRYANT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the National Congress of American Indians ("NCAI") is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the interests of Indians and Indian tribes. As relevant here, American Indian and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.

SUMMARY OF ARGUMENT

This case warrants this Court's review not only because it has created a split among the circuits, but also because of its dire consequences for efforts to protect Native women from domestic abuse. The court below held that uncounseled tribal court convictions cannot serve as predicate offenses triggering the felony

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief. The parties' letters of consent to the filing of this brief are being filed herewith.

repeat offender provisions of the Violence Against Women Act ("VAWA" or "Section 117"). This decision was wrong for multiple reasons and, if allowed to stand, will have dangerous consequences for Native women. The petition should be granted and the decision reversed.

First, the Ninth Circuit's decision will seriously impede the ability of law enforcement to prosecute and prevent domestic violence against Native women. American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women. Tribal governments, meanwhile, frequently lack the authority to impose felony sentences on repeat offenders. In enacting Section 117, Congress addressed this problem by authorizing federal criminal punishment for habitual domestic violence offenders in Indian country. Congress did so knowing that it had previously guaranteed counsel to defendants in tribal courts only at their own expense. The Ninth Circuit's decision undoes this congressional action by eliminating, as a practical matter, many predicate offenses from eligibility to trigger criminal punishment under Section 117. As a result, many repeat domestic violence offenders will not receive appropriate punishment. For Native women, the price will be steep.

Second, the Ninth Circuit's decision unduly interferes with the balance that Congress has struck between recognizing tribal sovereignty and protecting the rights of the accused. As this Court has repeatedly recognized, Indian tribes are sovereign nations whose actions are not constrained by the Constitution in the

same manner as states and local governments. Thus, for instance, it is long-settled that the Constitution does not require tribes to provide free assistance of counsel to criminal defendants. Congress, in turn, has never required tribes to pay for counsel in criminal proceedings where the defendant is indigent—even though it has made certain other constitutional guarantees, including the right to counsel at one's own expense, applicable in tribal court. Here, striking a balance between tribal interests and the rights of the accused, Congress enacted Section 117 knowing full well that not all predicate convictions would be counseled. The Ninth Circuit's decision disrupts that balance—and it does so without any actual basis for extending the Sixth Amendment to cover predicate convictions in tribal court.

In the end, the decision below has dangerous real-world consequences for American Indian and Native Alaskan women, who are disproportionately likely to be victims of domestic violence. More women are likely to be beaten, raped, and killed because of the Ninth Circuit's practical elimination of a crucial law enforcement tool. Even the court below recognized the need for this Court's review: "[G]iven the sharp division over the important issues at stake in this case, Supreme Court review may be unavoidable." Pet. App. 39a; *see also* Pet. App. 42a-43a (Owens, J., dissenting from denial of reh'g en banc) ("As our court has refused to take this case en banc, only the Supreme Court can rectify this terrible situation. I urge the Court to do so as soon as possible, before Michael Bryant, and the many more men like him, terrorize more women and their families."); Pet. App. 45a (O'Scannlain, J.,

dissenting from denial of reh'g en banc) ("[*E*]*very member of the panel* has acknowledged that this case requires the Supreme Court's attention.") (emphasis in original).

The Court should grant the petition for certiorari and reverse the Ninth Circuit's decision.

ARGUMENT

I. The Ninth Circuit's Decision Will Hinder Efforts to Address the Pervasive Problem of Domestic Violence in Indian Country.

The Ninth Circuit's decision—which, as the United States shows, directly conflicts with decisions of the Eighth and Tenth Circuits—will significantly impair efforts to prosecute and prevent domestic violence in Indian country. Native women experience domestic violence at far greater rates than other American women, and for far too long, federal law has left them with inadequate protections in either tribal or federal courts. Apprehending these problems, Congress passed Section 117 to authorize much-needed federal criminal punishment for repeat domestic violence offenders. The Ninth Circuit's decision undoes these protections for women at risk of domestic violence.

A. Violence Against American Indian and Alaska Native Women is a Serious Problem.

American Indian and Alaska Native women experience domestic violence at startling rates. *See* Pet. 24-25. Sixty-one percent of American Indian and Alaska Native women have been assaulted. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and

Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 22 (2000). American Indian and Alaska Native women are 2.5 times as likely to experience violent crimes as women of other races. Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime* 4-5 (2004). One local study found that 1 in 12 Native women experience violence perpetrated by their husband every year.[2] On some reservations, the murder rate of Native women is 10 times the national average.[3]

Rape and sexual assault are particularly prevalent. One-third of Native women will be raped in their lifetimes. Attorney General's Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (2014). American Indian and Alaska Native women are 2.5 times as likely to be raped or sexually assaulted as women in the United States in general. *Id.*; *see also* Michele C. Black et al., Ctrs. for Disease Control and Prevention, Nat'l Ctr. For Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3 (2011). When Native women are raped, they are more likely to

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[2] Ronet Bachman, et al, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* at 54 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

[3] *Id.* at 5.

experience other physical violence during the attack, their attacker is more likely to have a weapon, and they are more likely to have injuries requiring medical attention.[4]

Much of this violence is at the hands of intimate partners. Forty-three percent of American Indian women, and forty-six percent of Alaska Native women, will be subjected to rape, physical violence, or stalking by an intimate partner in their lifetimes. Black, et al., *supra*, at 39.

As shocking as these numbers are, they may not even capture the true scope of the problem: violence against women is systematically underreported. According to one study, between fifty and seventy-five percent of intimate-partner assaults are never reported. *See* Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 27 (2008). Women may distrust police, may fear that they will take too long to respond, or may believe the law will not be enforced. *Id.* at 104. They also may fear breaches of confidentiality or retaliation. Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 4 (2007).

Repeat offenders are commonplace, with domestic violence "often escalat[ing] in severity over time." *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014). One recent study found that women who were physically assaulted by an intimate partner averaged

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[4] *Id.* at 36.

nearly *seven* physical assaults by the same partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, at iv (2000). Indeed, the defendant in this case has at least eight prior domestic abuse convictions. *See* Presentence Investigation Report ("PSR") ¶ 81; Petition for Certiorari ("Pet.") 4-5.

Frequent violent episodes, moreover, are a harbinger of deadly violence in the future. *See* Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1091 (2003). That is true regardless of the severity of prior violent episodes; rather, the risk factor is the pattern of controlling and abusive behavior. As a result, the availability of felony-level sanctions for repeat offenders—even where any particular incident might not otherwise be so severe as to constitute felony assault—is an important tool to respond to an ongoing pattern of violence.

Federal law and policy, however, have undermined tribes' authority to punish and deter repeat offenders themselves. Indeed, until passage of the Tribal Law and Order Act of 2010 (TLOA), federal law limited tribal courts' sentencing authority to only one year. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258,

2279-80 (2010) (codified at 25 U.S.C. § 1302(a) and (b)).[5] The responsibility to punish felony-level crimes was left to the federal, or in some cases, the state government. As the United States notes in its petition, however, the federal government generally could not prosecute assaults unless they involved serious bodily injury, a standard that did not account for the pattern of attacks that domestic violence victims commonly encounter. Pet. 25.

B. Congress Enacted Section 117 to Assist Tribal Courts in Addressing Domestic Violence Against American Indians and Alaska Natives.

To ensure the availability of an appropriate response to habitual domestic violence, Congress enacted 18 U.S.C. § 117. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077-78 (2006) (setting forth findings regarding severity of domestic violence problem among American Indians and Alaska Natives). Section 117 imposes criminal penalties on a person who commits domestic assault in Indian country[6] and "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" of offenses equivalent to

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[5] Under TLOA, tribes can sentence offenders to up to three years. *Id.* Only a handful of tribes, however, have elected to make use of this provision (which is not at issue in this case).

[6] Section 117(a) also applies where the domestic assault takes place "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 117(a).

federal "assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner." 18 U.S.C. § 117(a). Section 117 thus created a new federal offense "to charge repeat domestic violence offenders before they seriously injure or kill someone" and "use tribal court convictions for domestic violence for that purpose." 151 Cong. Rec. 8983, 9061 (2005) (statement of Sen. McCain).

In enacting Section 117, Congress responded directly to the constraints on tribal and federal authority to adequately address domestic violence in Indian country. Congress recognized that, as a result of "the unique legal relationship of the United States to Indian tribes," the federal government had a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 § 901, 119 Stat. at 3077-78. Section 117 was necessary, Congress found, precisely because "Indian tribes require[d] additional . . . resources to respond to violent assaults against women." *Id.* Introducing Section 117, Senator McCain noted that although domestic violence was a national problem, combating it in Indian communities was particularly challenging: "[D]ue to the unique status of Indian tribes, there are obstacles faced by Indian tribal police, Federal investigators, tribal and Federal prosecutors and courts that impede their ability to respond to domestic violence in Indian Country." 151 Cong. Rec. 9062 (statement of Sen. McCain). As a result, Senator McCain continued, "perpetrators may escape felony charges until they seriously injure or kill someone." *Id.*

Section 117 struck directly at this problem. Specifically, Congress aimed to "ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." Violence Against Women and Dep't of Justice Reauthorization Act of 2005 § 902. With Section 117, federal prosecutors are able to effectively intervene in the cycle of abuse to prevent serious injury or even death. Even a single federal criminal prosecution under Section 117 can send a strong deterrent message on a reservation: habitual domestic violence offenders will be brought to justice and meaningfully punished.

C. The Ninth Circuit's Decision Will Severely Undermine the Efficacy of Section 117.

If allowed to stand, the Ninth Circuit's decision will severely hamper prosecution of habitual domestic violence offenders exactly where it is most needed. The court below recognized that uncounseled convictions in tribal courts do not themselves violate the Constitution. Yet it held that if indigent defendants do not receive appointed counsel in tribal court, those same convictions cannot "count" as predicate offenses for purposes of Section 117. The upshot is that many tribal court convictions in the Ninth Circuit cannot give rise to Section 117 convictions. The reason, quite simply, is that many tribal courts do not appoint counsel for indigent defendants as a matter of course—a fact that is unsurprising in light of a federal law that gives defendants the right to counsel in tribal court only at their own expense.

By largely eliminating Section 117 as a tool to punish and deter domestic violence among Native Americans and Alaska Natives, the Ninth Circuit's decision leaves tribes to address the problem—once again—on their own and subject to limitations on their authority imposed by federal law. Without effective recourse to Section 117, prosecutors will have to wait for substantial bodily injury—or worse—before they can intervene to hold a known repeat domestic violence offender accountable. *See* 18 U.S.C. §§ 113(a)(7), 1152, 1153. Meanwhile, Native women trapped in cycles of abuse will again be left with no protection under federal law until they are seriously injured, regardless of how often they are harassed or abused. These far-reaching consequences warrant this Court's review.

II. The Ninth Circuit's Decision Undermines the Deliberate Balance Congress Has Struck Between Tribal Sovereignty and Defendants' Rights.

The devastating consequences of the Ninth Circuit's decision for efforts to combat domestic violence in Indian communities are reason enough to grant the petition. Equally significant, however, is the opinion's disruption of the delicate balance that Congress has struck between tribal sovereignty, on one hand, and the rights of criminal defendants, on the other.

A. Congress Has Repeatedly Addressed the Intersection of Tribal Sovereignty and Defendants' Rights, and Has Declined to Require the Appointment of Counsel for All Tribal Court Defendants.

Indian tribes retain inherent sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *superseded by statute on other grounds*, *United States v. Lara*, 541 U.S. 193 (2004). As sovereigns, tribes possess the power to prosecute crimes by and against Indians within the limits of their jurisdiction. *See* Cohen's Handbook of Federal Indian Law § 9.04 (2012). In such prosecutions, tribes are not restrained by the Bill of Rights, for their "powers of local self government . . . existed prior to the [C]onstitution." *Talton v. Mayes*, 163 U.S. 376, 384 (1896). At the same time, however, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (quotation marks omitted); *see also United States v. Celestine*, 215 U.S. 278, 285 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962). In exercising this power, Congress has extended an appointed-counsel right to tribal court defendants in certain limited circumstances—but it has never done so across the board.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA). Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303). ICRA, which balances tribal sovereignty against

the rights of criminal defendants, requires tribes to adhere to various criminal procedural requirements similar to those found in the Bill of Rights. *See* 25 U.S.C. § 1302; Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 673 (2013). For instance, ICRA statutorily bars tribes from trying a person twice for the same offense, from compelling any person in a criminal case to be a witness against himself, or from denying a criminal defendant the right to a speedy trial. 25 U.S.C. § 1302(a). ICRA also limits tribal courts' sentencing authority to one year in prison unless they provide certain additional procedural guarantees. *Id.* § 1302(a)(7).

ICRA does not, however, confer an across-the-board the right to appointed counsel in criminal proceedings. Instead, ICRA provides only that a tribal court defendant may have the assistance of counsel *at his own expense*. 25 U.S.C. § 1302(a)(6). This is so even though ICRA's passage followed *Gideon v. Wainwright*, 372 U.S. 335 (1963), the landmark decision guaranteeing appointed counsel in state criminal proceedings, by just five years. In declining to extend a right to appointed counsel, Congress may have recognized—as Justice O'Connor has observed—that "the decision-making process[es used] by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 3 (1997). Thus, in some cases, tribal justice systems rely on lay advocates, and in others the judge or other decisionmaker plays a larger role in protecting the rights of the accused than

is typical in Western justice systems. Regardless of its motives, however, it is clear that Congress considered the right to counsel, yet deliberately decided *not* to require appointed counsel in all tribal court criminal proceedings.

In 2010, Congress revisited the right to counsel in tribal court proceedings when it raised the sentencing limitation on tribal courts. Again, however, it declined to categorically require appointment of counsel. Specifically, the Tribal Law and Order Act of 2010 amended ICRA to permit tribes to impose penalties of up to three years for a single offense. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (codified at 25 U.S.C. § 1302(a), (b)). Together with this authorization of increased penalties, Congress provided additional rights to criminal defendants: *If* a tribe imposes a term of imprisonment of more than one year, it must provide the defendant with certain added protections, including indigent counsel. 25 U.S.C. § 1302(c). That right to appointed counsel for indigent defendants applies only in these limited circumstances. If the defendant's punishment is less severe, Congress determined, appointed counsel is not required.

Just two years ago, Congress once again addressed these issues, and once again declined to give all tribal court criminal defendants the right to appointed counsel. The Violence Against Women Reauthorization Act (VAWA) of 2013 "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit domestic violence offenses against an American Indian or Alaska Native on tribal lands. Pub. L. No. 113-4,

§ 904, 127 Stat. 54, 120-23 (codified at 25 U.S.C. § 1304(b)(1)). VAWA of 2013 then created a "special domestic violence criminal jurisdiction" over non-Indians that a tribe could not otherwise exercise. 25 U.S.C. § 1304(a)(6). While thus providing tribal courts with more power, Congress granted defendants additional rights: To impose a term of imprisonment of any length under this special domestic violence criminal jurisdiction, tribes must guarantee defendants the right to appointed counsel. 25 U.S.C. § 1304(d)(2). Again, however, Congress did not see fit to extend an appointed-counsel right to *all* tribal court criminal defendants—and in any event, whether to exercise jurisdiction under VAWA is completely optional for a tribe.

In short, Congress has—over a period of nearly five decades—balanced tribal sovereignty against the rights of criminal defendants. It has never required the appointment of counsel in all tribal court criminal proceedings. Indeed, when Congress passed Section 117 in 2006, and thus allowed tribal court convictions to be used as predicate offenses for a habitual-offender prosecution, it was well aware that tribal court criminal defendants had no right to appointed counsel. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (presumption that "Congress is aware of existing law when it passes legislation"). They had only the more limited right that Congress itself afforded under ICRA: the right to retain (and pay for) counsel oneself.

B. The Ninth Circuit's Decision Flouts Congressional Intent and Undermines Tribal Sovereignty.

The decision below holds that, subject to a narrow exception not applicable here, "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." Pet. App. 12a. Thus, the Ninth Circuit requires tribal courts to provide indigent defendants with appointed counsel if their convictions are to "count" for purposes of Section 117.

That requirement disrupts the balance that Congress has struck between tribal sovereignty and the rights of criminal defendants. In ICRA and its subsequent amendments, Congress decided "that not all provisions of the Constitution" would "be imposed upon the freedom of Indian tribes to conduct themselves in accordance with their own tribal laws." *United States v. Ant*, 882 F.2d 1389, 1398 (9th Cir. 1989) (O'Scannlain, J., dissenting). Rather, Congress has handled this question in a nuanced fashion, repeatedly refining the interaction of tribal court jurisdiction and the Bill of Rights' criminal procedure protections. Each time, Congress has declined to extend the right to appointed counsel to all tribal court defendants.

The Ninth Circuit's decision disregards Congress's deliberate choice, in the exercise of its plenary power over Indian country, *not* to require tribal courts to provide appointed counsel outside the limited circumstances set forth in ICRA as amended. In doing so, the opinion deprives Indian tribes—sovereign

nations—of the flexibility that Congress intended them to have. As Judge O'Scannlain explained in his dissent in *Ant*: "Had Congress intended that the full panoply of sixth amendment protections be imposed upon tribal courts, it clearly could have said so in the ICRA." *Id.*; *see id.* ("Because the nature of comity between tribal courts and federal courts . . . is so sensitive and so delicately balanced, it is up to Congress, not [a court], to change the rules if they should be changed at all."). In enacting Section 117, Congress allowed tribal court convictions to count as predicates, knowing that those convictions may not have resulted from proceedings where the defendant was guaranteed appointed counsel. The choice was Congress's to make.

* * *

As the petition for certiorari demonstrates, the Ninth Circuit's decision contravenes Supreme Court precedent, *see Nichols v. United States*, 511 U.S. 738 (1994), creates a circuit split, and is wrong on the merits. Moreover, as explained above, the opinion will hinder efforts to address the pervasive problem of domestic violence in Indian country. Not only that, but it undermines the deliberate balance Congress has struck between tribal sovereignty and defendants' rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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November 4, 2015

Supreme Court, U.S.
FILED
JAN 28 2016
OFFICE OF THE CLERK

No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 5, 2015
CERTIORARI GRANTED: DEC. 14, 2015

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Materials Previously Reproduced

The following documents have been omitted from the Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 12-30177

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BRYANT, JR., DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/12	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: 46 mos. Transcript ordered by 06/08/2012. Transcript due 07/09/2012. Appellant briefs and excerpts due by 08/17/2012 for Michael Bryant Jr.. Appellee brief due 09/17/2012 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [8184206] (WF) [Entered: 05/18/2012 03:30 PM]
		* * * * *
8/31/12	4	Submitted (ECF) Opening brief for review. Submitted by Appellant

DATE	DOCKET NUMBER	PROCEEDINGS
		Michael Bryant, Jr.. Date of service: 08/31/2012. [8307595] (Babcock, Steven) [Entered: 08/31/2012 02:44 PM]
		* * * * *
8/31/12	6	Filed clerk order: The opening brief [4] submitted by Michael Bryant, Jr. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8307717] (RH) [Entered: 08/31/2012 03:22 PM]
		* * * * *
9/4/12	8	Filed Appellant Michael Bryant, Jr. excerpts of record in 2 volumes. Served on 08/31/2012. [8309101] (RH) [Entered: 09/04/2012 02:07 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
9/4/12	9	Filed by Appellant 4 copies of presentence report UNDER SEAL. [8309106] (RH) [Entered: 09/04/2012 02:08 PM]
		* * * * *
11/15/12	15	Submitted (ECF) Answering brief for review. Submitted by Appellee USA. Date of service: 11/15/2012. [8403218] (Shin, Michael) [Entered: 11/15/2012 12:29 PM]
11/15/12	16	Filed clerk order: The answering brief [15] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8403302] (RH) [Entered: 11/15/2012 01:07 PM]
		* * * * *
12/13/12	20	Submitted (ECF) Reply brief for review. Submitted by Appellant

DATE	DOCKET NUMBER	PROCEEDINGS
		Michael Bryant, Jr.. Date of service: 12/13/2012. [8437937] (Babcock, Steven) [Entered: 12/13/2012 02:04 PM]
12/13/12	21	Filed clerk order: The reply brief [20] submitted by Michael Bryant, Jr. is filed. Within 7 days of the filing of this order, appellant is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8438360] (GV) [Entered: 12/13/2012 03:48 PM]
		* * * * *
4/24/13	29	Filed clerk order (Deputy Clerk: SM): Consideration of this case is stayed pending the issuance of the mandate in United States v. First, No. 11-30346 (argued Nov. 8, 2012). Upon issuance of that mandate, the parties shall file, within 30 days, supplemental briefs discussing the effect of First on the present appeal.

DATE	DOCKET NUMBER	PROCEEDINGS
		The briefs shall be filed simultaneously and contain no more than 4,000 words. The oral argument scheduled for May 7, 2013 is vacated. This case is returned to the clerk for rescheduling before the next available Portland panel following the issuance of the First mandate and the completion of supplemental briefing. [8603745] (SM) [Entered: 04/24/2013 04:43 PM]
		* * * * *
10/2/13	32	Filed (ECF) Appellee USA citation of supplemental authorities. Date of service: 10/02/2013. [8806204] (Johnson, Leif) [Entered: 10/02/2013 10:48 AM]
1/21/14	33	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA. Date of service: 01/21/2014. [8944452] (Johnson, Leif) [Entered: 01/21/2014 07:54 AM]
1/21/14	34	Filed (ECF) presentence report UNDER SEAL by Appellee USA. [8944454] (Johnson, Leif) [Entered: 01/21/2014 07:55 AM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/21/14	37	Filed clerk order: The supplemental brief [33] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8945658] (GV) [Entered: 01/21/2014 02:33 PM]
		* * * * *
1/27/14	39	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Michael Bryant, Jr.. Date of service: 01/27/2014. [8953738] (Babcock, Steven) [Entered: 01/27/2014 02:18 PM]
1/28/14	40	Filed clerk order: The supplemental brief [39] submitted by Michael Bryant, Jr. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each

DATE	DOCKET NUMBER	PROCEEDINGS
		copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8956590] (GV) [Entered: 01/28/2014 04:19 PM]
		* * * * *
4/9/14	43	Submitted (ECF) excerpts of record. Submitted by Appellant Michael Bryant, Jr.. Date of service: 04/09/2014. [9050381] (Babcock, Steven) [Entered: 04/09/2014 07:46 AM]
4/29/14	44	Notice of Oral Argument on Thursday, July 10, 2014 - 09:00 A.M. - PO 2nd Floor Ctrm - Portland, OR.
		* * * * *
7/7/14	47	Filed (ECF) Appellee USA Correspondence: Letter of Concession regarding prior tribal court convictions. Date of service: 07/07/2014 [9157918] (Johnson, Leif) [Entered: 07/07/2014 12:15 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
7/8/14	48	Filed (ECF) Appellant Michael Bryant, Jr. citation of supplemental authorities. Date of service: 07/08/2014. [9159812] (Babcock, Steven) [Entered: 07/08/2014 11:25 AM]
7/10/14	49	ARGUED AND SUBMITTED TO HARRY PREGERSON, RICHARD A. PAEZ and PAUL J. WATFORD. [9164057] (ML) [Entered: 07/10/2014 01:40 PM]
9/30/14	50	FILED OPINION (HARRY PREGERSON, RICHARD A. PAEZ and PAUL J. WATFORD) REVERSED. Judge: RAP Authoring, Judge: PJW Concurring. FILED AND ENTERED JUDGMENT. [9258669] (RP) [Entered: 09/30/2014 08:12 AM]
		* * * * *
12/15/14	56	Filed (ECF) Appellee USA petition for rehearing en banc (from 09/30/2014 opinion). Date of service: 12/15/2014. [9349054] [12-50177] (Johnson, Leif) [Entered: 12/15/2014 10:53 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
12/24/14	57	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by National Congress of American Indians. Date of service: 12/24/2014. [9361164] [12-30177] (Segal, Joshua) [Entered: 12/24/2014 08:16 AM]
		* * * * *
12/26/14	59	Filed order (HARRY PREGERSON, RICHARD A. PAEZ and PAUL J. WATFORD): Appellant is ordered to file a response to Appellee United States of Americaâ€™s Petition for Rehearing En Banc, filed on December 15, 2014 (Dkt. 56). The response shall be filed within twenty one (21) days of the date of this order, and shall not exceed fifteen pages. [9362892] (AF) [Entered: 12/26/2014 04:04 PM]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/15	62	Filed (ECF) Appellant Michael Bryant, Jr. response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 03/17/2015. [9460641]. [12-30177] (Babcock, Steven) [Entered: 03/17/2015 01:18 PM]
7/6/15	63	Filed Order for PUBLICATION (HARRY PREGERSON, RICHARD A. PAEZ and PAUL J. WATFORD) Concurrence by Judge Paez; Dissent by Judge Owens; Dissent by Judge O'Scannlain) The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. Judge McKeown did not participate in the deliberations or vote in this case. [9598308] (RP) [Entered: 07/06/2015 07:06 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
7/15/15	64	MANDATE ISSUED. (HP, RAP and PJW) [9610810] (RL) [Entered: 07/15/2015 10:44 AM]
10/7/15	65	Received notice from the Supreme Court: petition for certiorari filed on 10/05/2015. Supreme Court Number 15-420. [9710176] (RR) [Entered: 10/07/2015 12:58 PM]
12/15/15	66	Received notice from the Supreme Court. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is GRANTED on 12/14/2015. Supreme Court Number 15-420. [9793339] (RL) [Entered: 12/15/2015 02:10 PM]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA (BILLINGS)

Docket No. 11-cr-00070

UNITED STATES OF AMERICA

v.

MICHAEL BRYANT, JR.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/23/11	1	COMPLAINT as to Michael Bryant, Jr (1). (JDH,) [1:11-mj-00030-CSO] (Entered: 05/24/2011)
		* * * * *
5/25/11	3	Minute Entry for proceedings held before Magistrate Carolyn S Ostby: Initial Appearance as to Michael Bryant, Jr held on 5/25/2011. Defendant present and in custody appearing w/Attorney Mark Werner for today only; Ryan Archer appearing for Vince Carroll on behalf of USA. Defendant files a financial affidavit, and the Court appoints Steve Babcock and the Federal Defenders of MT for all proceedings. Defendant waives a preliminary hearing but reserves the right to a detention hearing at a later date.

DATE	DOCKET NUMBER	PROCEEDINGS
		Defendant is remanded to custody of USMS. (Tape #FTR Gold; L/C James Conwell.) (POC,) [1:11-mj-00030-CSO] (Entered: 05/25/2011)
5/25/11	4	ORDER APPOINTING STEVE BABCOCK and the FEDERAL DEFENDERS of MT as to Michael Bryant, Jr. Signed by Magistrate Carolyn S Ostby on 5/25/2011. (POC,) [1:11-mj-00030-CSO] (Entered: 05/25/2011)
5/25/11	5	CJA 23 Financial Affidavit by Michael Bryant, Jr (POC,) [1:11-mj-00030-CSO] (Entered: 05/25/2011)
5/26/11	7	NOTICE *of Assertion of Fifth & Sixth Amendment Rights* by Michael Bryant, Jr (Attachments: # 1 Exhibit Assertion of Fifth & Sixth Amendment Rights) (Babcock, Steven) [1:11-mj-00030-CSO] (Entered: 05/26/2011)
		* * * * *
6/20/11	9	INDICTMENT as to Michael Bryant, Jr (1) count(s) 1-2. (CLR) (Entered: 06/21/2011)
		* * * * *
11/7/11	19	MOTION to Dismiss *Indictment* by Michael Bryant, Jr. (Babcock, Steven) (Entered: 11/07/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
11/07/11	20	BRIEF/MEMORANDUM in Support by Michael Bryant, Jr re 19 MOTION to Dismiss *Indictment* (Babcock, Steven) (Entered: 11/07/2011)
11/14/11	21	RESPONSE to Motion by USA as to Michael Bryant, Jr re 19 MOTION to Dismiss *Indictment United States' Response to Defendant's Motion to Dismiss Indictment* (Carroll, E.) (Entered: 11/14/2011)
		* * * * *
12/21/11	25	Minute Entry for proceedings held before Judge Jack D Shanstrom: MOTION HEARING as to Michael Bryant, Jr held on 12/21/2011 re 19 MOTION to Dismiss *Indictment* filed by Michael Bryant, Jr. Defendant was present and in custody w/ attorney Steven Babcock, and AUSA E. Vincent Carroll was present for the government. Defense counsel made his argument to the court. AUSA made his argument to the court and the Defense gave his final argument. Motions terminated as to Michael Bryant, Jr: 19 MOTION to Dismiss *Indictment* filed by Michael Bryant, Jr.. The

DATE	DOCKET NUMBER	PROCEEDINGS
		court DENIED defendant's motion to dismiss and advised of his right to appeal the decision. The defendant was remanded to the custody of the USMS. (Court Reporter JoAnn Bacheller, L/C V. Pham & D/C H. McLean.) (HMM) (Entered: 12/21/2011)
1/9/12	26	MOTION TO CHANGE PLEA by Michael Bryant, Jr. (Attachments: # 1 Text of Proposed Order) (Babcock, Steven) (Entered: 01/09/2012)
1/10/12	27	CONDITIONAL PLEA AGREEMENT as to Michael Bryant, Jr. (HMM) (Entered: 01/10/2012)
1/11/12	28	Order Setting as to Michael Bryant, Jr. 2/13/2012 trial vacated. Change of Plea Hearing set for 2/8/2012 at 09:45 AM in Billings, MT before Judge Jack D Shanstrom. Signed by Judge Jack D Shanstrom on 1/11/2012. (LEI,) (Entered: 01/11/2012)
1/12/12	29	OFFER OF PROOF as to Michael Bryant, Jr (Carroll, E.) (Entered: 01/12/2012)
2/8/12	30	Minute Entry for proceedings held before Judge Jack D Shanstrom: CHANGE OF PLEA HEARING as to Michael Bryant, Jr held on

DATE	DOCKET NUMBER	PROCEEDINGS
		2/8/2012. Defendant was present and in custody w/ attorney Steven Babcock (Fed.Def.), AUSA E. Vincent Carroll was present for the government and USPO P. McLean was present. Defendant stated his age and education. Defendant states that he has read, understood and signed each page of the plea agreement now on file w/ the Court. The Court advised the Defendant of his rights, the rights he will be waiving by entering a plea of guilty and of the maximum sentence and penalties that could be imposed; Defendant states that he understands his rights. AUSA Carroll read the government's offer of proof into the record and the defendant agreed to facts as stated. Plea entered by Michael Bryant Jr. (1) Guilty as to Counts 1-2. Motions terminated as to Michael Bryant, Jr: 26 MOTION TO CHANGE PLEA filed by Michael Bryant, Jr.. The court set sentencing for 05/09/2012 at 9:15 a.m. in front of Judge Shanstrom in Billings, MT. Defendant was remanded to the custody of the USMS. (Court Reporter Kim Marchwick,

DATE	DOCKET NUMBER	PROCEEDINGS
		L/C V. Pham & D/C H. McLean) (HMM) (Entered: 02/08/2012)
		* * * * *
5/9/12	33	Minute Entry for proceedings held before Judge Jack D Shanstrom: SENTENCING held on 5/9/2012 for Michael Bryant, Jr. as to Count(s) 1-2. Defendant was present and in custody w/ attorney Steven Babcock (Fed.Def.), AUSA Marcia Hurd was present for the government and USPO S. Lyle was present. Defendant stated that he has read the PSR and has no objections. The Court read the guidelines into the record. Defense counsel gave his argument, AUSA gave her argument and the defendant made a statement on his own behalf. Defendant was sentenced to 46 months on Count 1 and 46 months on Count 2 to run concurrent for a total of 46 months to be followed by 3 years of supervised release on Count 1 and 3 years on Count 2 to run concurrent w/ conditions and special conditions. A special assessment of 200.00 is due immediately. Fine was waived by the Court. The Court will reccomend

DATE	DOCKET NUMBER	PROCEEDINGS
		placement at Sheridan, OR (RDAP and vocational rehabilitation). Defendant was advised of his right to appeal and remanded to the custody of the USMS. Presentence Report due by 5/16/2012. (Court Reporter Vonni Bray, L/C T. Mackay & D/C H. McLean.) (HMM) (Entered: 05/09/2012)
5/9/12	34	JUDGMENT as to Michael Bryant, Jr. (1), Count(s) 1-2, Defendant was sentenced to 46 months on Count 1 and 46 months on Count 2 to run concurrent for a total of 46 months to be followed by 3 years of supervised release on Count 1 and 3 years on Count 2 to run concurrent w/ conditions and special conditions. A special assessment of 200.00 is due immediately. Signed by Judge Jack D Shanstrom on 5/9/2012. A copy of this judgment and the SOR was e-mailed sealed to both counsel of record on today's date. (HMM) (Entered: 05/09/2012)
5/10/12	36	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Michael Bryant, Jr. (HMM) (Entered: 05/10/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
5/18/12	37	NOTICE OF APPEAL by Michael Bryant, Jr re 34 Judgment,, Filing fee $0 (waived FedDef), receipt number fdom. (Babcock, Steven) Modified on 5/18/2012 to correct fee info. (HMM) (Entered: 05/18/2012)
		* * * * *
6/10/12	42	TRANSCRIPT OF HEARING ON MOTION filed as to Michael Bryant, Jr. held on 12-21-2011 before Judge Jack D. Shanstrom re 37 Notice of Appeal-Final Judgment. Contact Court Reporter JoAnn Bacheller, 406-698-9965, joanncbacheller @yahoo.com. Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the clerk's office, or the court reporter. NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 14 DAYS OF THIS FILING. Transcript Redaction Procedures. Redaction Request due 7/2/2012. Redacted Transcript Deadline set for 7/11/2012. Release of Transcript

DATE	DOCKET NUMBER	PROCEEDINGS
		Restriction set for 9/10/2012. (JCB) (Entered: 06/10/2012)
		* * * * *
8/30/12	43	Judgment Returned Executed as to Michael Bryant, Jr on 08/22/2012. Defendant was placed at FCI Sheridan in Sheridan, Oregon. (HMM) (Entered: 08/30/2012)
		* * * * *
10/1/14	44	USCA OPINION : We hold that the § 117(a) charges against Bryant must bedismissed because at least one of his predicate tribal court-domestic abuse convictions was uncounseled and resulted ina term of imprisonment. REVERSED (EMH,) (Entered: 10/01/2014)
10/7/14	45	ORDER of USCA as to Michael Bryant, Jr re 37 Notice of Appeal - Final Judgment. (ACL,) (Entered: 10/07/2014)
		* * * * *
7/7/15	58	ORDER of USCA re 37 Notice of Appeal. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active

DATE	DOCKET NUMBER	PROCEEDINGS
		judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. (Concurrence by Judge Paez; Dissent by Judge Owens; Dissent by Judge OScannlain; Judge McKeown did not participate in the deliberations or vote in this case.) (ACL,) Modified on 7/8/2015 to edit text. (NOB) (Entered: 07/07/2015)
		* * * * *
7/23/15	62	TRANSCRIPT of Change of Plea as to Michael Bryant, Jr held on 2/12/2015, before Judge Jack D. Shanstrom. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the Clerks Office or the court reporter NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 14 DAYS OF THIS FILING. Contact Court Reporter Kim Marchwick, P.O. Box 10447, Bozeman, MT 59719, (406) 671-2307, kimmarchwick@wildblue.net. Trans-

DATE	DOCKET NUMBER	PROCEEDINGS
		cript Redaction Procedures. Redaction Request due 8/13/2015. Redacted Transcript Deadline set for 8/24/2015. Release of Transcript Restriction set for 10/21/2015. (EMH,) (Additional attachment(s) added on 8/11/2015: # 1 Certified Transcript) (EMH,). Modified on 8/11/2015 Official Complete Signend Transcript filed, NEF regenerated (EMH,). (Entered: 07/23/2015)
		* * * * *
8/18/15	64	TRANSCRIPT of SENTENCING re 63 Transcript Designation Order Form, as to Michael Bryant, Jr held on 5/9/2012, before Judge Shanstrom. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER, the Clerks Office or the court reporter NOTICE: A NOTICE OF INTENT TO REQUEST REDACTION MUST BE FILED WITHIN 14 DAYS OF THIS FILING. Contact Court Reporter Vonni Bray, 406-670-9533. Transcript Redaction Procedures. Redaction Request due 9/8/2015.

DATE	DOCKET NUMBER	PROCEEDINGS
		Redacted Transcript Deadline set for 9/18/2015. Release of Transcript Restriction set for 11/16/2015. (ACL,) (Entered: 08/18/2015)
		* * * * *
8/21/15	65	Unopposed MOTION Unopposed Motion to Release Defendant From Supervised Release by Michael Bryant, Jr. (Attachments: # 1 Text of Proposed Order) (Babcock, Steven) (Entered: 08/21/2015)
8/21/15	66	ORDER granting 65 Motion For Release of Defendant from Supervised Release as to Michael Bryant Jr. (1). Signed by Judge Susan P. Watters on 8/21/2015. (Copy Order to USPO) (EMH,) (Entered: 08/21/2015)
		* * * * *
10/7/15	67	Notice received from U.S. Supreme Court: The petition for a writ of certiorari in the above entitled case was filed on October 5, 2015 and placed on the docket October 5, 2015 as No. 15-420. (EMH,) (Entered: 10/07/2015)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/15/15	68	WRIT OF CERTIORARI GRANTED by US Supreme Court as to Michael Bryant, Jr re 37 Notice of Appeal. The motion of respondent to proceed in forma pauperis is granted. (NOB) (Entered: 12/15/2015)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR 11-70-BLG -DS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL BRYANT, JR., DEFENDANT

[Filed: June 20, 2011]

INDICTMENT

DOMESTIC ASSAULT BY HABITUAL OFFENDER
Title 18 U.S.C. § 117(a)
(Penalty: Five years imprisonment, $250,000 fine, and three years supervised release)

THE GRAND JURY CHARGES:

COUNT I

That on or about February 28, 2011, at Birney, in the State and District of Montana, and within the exterior boundaries of the Northern Cheyenne Indian Reservation, being Indian country, the defendant, MICHAEL BRYANT, JR., intentionally assaulted C.L.O., a person who cohabitated with and was an intimate partner of the defendant, after having been convicted of at least two separate prior domestic assaults, in violation of 18 U.S.C. § 117(a).

COUNT II

That on or about May 7, 2011, at Birney, in the State and District of Montana, and within the exterior boundaries of the Northern Cheyenne Indian Reservation, being Indian country, the defendant, MICHAEL BRYANT, JR., intentionally assaulted D.E., a person who cohabitated with and was an intimate partner of the defendant, after having been convicted of at least two separate prior domestic assaults, in violation of 18 U.S.C. § 117(a).

A TRUE BILL.

/s/ [ILLEGIBLE]
FOREPERSON

/s/ [ILLEGIBLE] for
MICHAEL W. COTTER
United States Attorney
Attorney for Plaintiff

/s/ [ILLEGIBLE] for
KRIS A. MCLEAN
Criminal Chief Assistant U.S. Attorney
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR 11-70-BLG-JDS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL BRYANT, JR., DEFENDANT

[Filed: Jan. 10, 2012]

CONDITIONAL PLEA AGREEMENT

(Rule 11(a)(2), *Federal Rules of Criminal Procedure* – Reserving Issue for Appeal)

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, by E. Vincent Carroll, Assistant United States Attorney for the District of Montana, and the defendant, MICHAEL BRYANT, JR., and his attorney, Steven C. Babcock, have agreed upon the following:

1. The defendant acknowledges that he has been charged in the Indictment in this case with a violations of 18 U.S.C. § 117(a), Domestic Assault By an Habitual Offender.

2. The defendant has read the charges against him contained in the Indictment and those charges have been fully explained to him by his attorney.

3. The defendant fully understands the nature and elements of the crimes with which he has been charged.

4. The defendant will enter a voluntary plea of guilty to counts one and two of the indictment in this case.

5. *Nature of the Agreement:* The parties agree that this plea agreement, which is conditional as to the right to appeal but unconditional as to the sentence that can be imposed by the Court, shall be filed and become a part of the record in this case, and will be governed by Rule 11(a)(2), Federal Rules of Criminal Procedure, wherein the defendant reserves, with the consent of the government, the right to appeal the adverse pre-trial ruling denying defendant's motion to dismiss the indictment by the Court, and make certain nonbinding recommendations as to sentence.

This plea agreement is conditional pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure. The defendant reserves the right to have an appellate court review the adverse resolution of the defendant's pretrial motion to dismiss. The defendant acknowledges that this right may only be reserved with the consent of the court and the government. By this agreement the United States gives its consent to the defendant's reservation.

Effect of Withdrawal from the Agreement: The parties stipulate and agree that if the defendant moves to withdraw his guilty plea, entered pursuant to and receiving the benefits of this agreement, and if he successfully withdraws his plea either in the district

court or on appeal, that this agreement will become null and void.

Moreover, if the defendant at any time after judgment is entered obtains dismissal, reversal or remand of the count or counts of conviction for any reason, other than on the basis of the issue or issues reserved herein for appeal, the United States will be permitted, by agreement of the parties, to restore all original charges either dismissed or not filed pursuant to this plea agreement. The defendant, in that circumstance, expressly waives any claim of double jeopardy or right to have this agreement enforced. In such event, the defendant waives any objections, motions, or defenses based upon the Statute of Limitations, the Speedy Trial Act, or any other potential restriction on the reinstitution of counts dismissed, or institution of counts surrendered, as part of the consideration given by the prosecution in this agreement.

6. *Admission of Guilt:* The defendant will plead guilty because he is in fact guilty of the charges contained in the Indictment. In pleading guilty, the defendant acknowledges:

Count I

That on or about February 28, 2011, at Birney, in the State and District of Montana, and within the exterior boundaries of the Northern Cheyenne Indian Reservation, being Indian country, the defendant, MICHAEL BRYANT, JR., intentionally assaulted C.L.O., a person who cohabitated with and was an intimate partner of the defendant, after having been convicted of at least two separate prior domestic assaults, in violation of 18 U.S.C. § 117(a).

Count II

That on or about May 7, 2011, at Birney, in the State and District of Montana, and within the exterior boundaries of the Northern Cheyenne Indian Reservation, being Indian country, the defendant, MICHAEL BRYANT, JR., intentionally assaulted D.E., a person who cohabitated with and was an intimate partner of the defendant, after having been convicted of at least two separate prior domestic assaults, in violation of 18 U.S.C. § 117(a).

7. *Maximum Punishment Provided by Law:* The defendant understands the charges to which he will plead guilty carry a maximum penalty of five years, each, imprisonment and a $250,000 fine each. Further, the defendant acknowledges that the crimes to which he is entering a plea are Class D felonies, 18 U.S.C. § 3559(a)(4), which provides for a maximum term of supervised release of three years each. 18 U.S.C. § 3583(b)(2).

8. *Elements of the Charge:* The defendant has been advised of the nature of the charges made against him and the elements of the crimes to which he is entering a guilty plea. The defendant understands that if the case were to go to trial the government would be required to prove each and every element of the crimes. He further acknowledges that these are the elements of the crimes charged in the Indictment:

Domestic Abuse by an Habitual Offender:
Title 18 U.S.C. § 117(a)

First, the crime occurred on the Northern Cheyenne Indian Reservation;

Second, the defendant intentionally committed a domestic assault;

Third, the defendant has at least two separate prior convictions in tribal court, that would be, if subject to federal jurisdiction, an assault against an intimate partner.

The defendant understands that by entering a guilty plea, the government will not be required to present proof of his guilt and the elements recited herein because there will be no trial if the Court accepts his plea of guilty and the plea agreement of the parties.

9. *Recitation of Rights:*

(a) During the entry of any plea pursuant to this plea agreement, the government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement that the defendant gives during any such plea colloquy.

(b) If the defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury.

(c) The defendant has the right to be represented by counsel, and if necessary, have the court appoint counsel, at trial and at every other stage of these proceedings.

(d) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is

shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict him unless after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

(e) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not he was persuaded of the defendant's guilt beyond a reasonable doubt.

(f) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence in his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(g) At a trial, the defendant would have a privilege against self-incrimination so that he could decline to testify and no inference of guilt could be drawn from his refusal to testify. If the defendant desired to do so, he could testify in his own behalf.

(h) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal his conviction to the Ninth Circuit Court of Appeals for review to determine if any

errors were made which would entitle him to reversal of the conviction.

(i) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, *Federal Rules of Criminal Procedure*. By his execution of this agreement, the defendant expressly waives that right and agrees to hold that hearing before, and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge.

10. *Waiver of Rights by Plea:* The defendant understands that by pleading guilty pursuant to this agreement, he is waiving all the rights set forth in the prior paragraph. The defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

11. *Recommendations:*

The parties are each free to argue for any reasonable sentence.

The United States will recommend that the defendant be given a two point credit for acceptance of responsibility, unless the defendant is found to have obstructed justice prior to sentencing. USSG § 3C1.1.

The United States reserves the right to object to or comment upon the applicability, or inapplicability, of any adjustment or enhancement to be used in the advisory sentencing guideline calculation. The United States further reserves the right to object to a sentence outside the advisory guideline range determined by the Court. The United States will object to making any term of incarceration imposed in this case concurrent to any other sentence the defendant may be serving.

Both parties acknowledge that the Court is not bound by the recommendations of either party, and may sentence the defendant to a sentence anywhere within the advisory Guideline range or may impose any reasonable sentence outside that guideline range.

Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

12. *Effect of Early Decision*: If the defendant otherwise qualifies for a two level adjustment for acceptance of responsibility, and his offense level is 16 or greater, and if the defendant files this agreement or a Motion for Change of Plea Hearing at least 14 days prior to the date now set for trial, the United States will move the Court at the time of sentencing to award the defendant an additional point for acceptance of responsibility pursuant to USSG § 3E1.1(b).

13. *Non-Prosecution or Dismissal:* Upon acceptance of this agreement by the Court, the United States Attorney for Montana shall bring no further action against the defendant based upon the facts alleged in this Indictment. Both parties acknowledge that the prosecution has no authority to bind the U.S. Probation Office or the Court with respect to guideline enhancements or adjustments they deem appropriate.

14. *Voluntary Plea:* The defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this agreement to induce the defendant to plead guilty.

15. *Special Assessment/ Financial Obligations:* The defendant recognizes that he will be responsible for a mandatory assessment of $100 on each count of conviction pursuant to 18 U.S.C. § 3013 of the Comprehensive Criminal Control Act. The defendant understands and agrees that pursuant to 18 U.S.C. § 3613, whatever monetary penalties are imposed by the Court will be due and payable immediately, and subject to immediate enforcement by the United States. Furthermore, the defendant agrees to provide all of his financial information to the United States and the Probation Office and, if requested, to participate in a pre-sentencing debtor's examination. If the Court imposes a schedule of payments, the defendant understands that the schedule of payments is merely a minimum schedule of payments and not the only method, nor a limitation on the methods available to the United States to enforce the judgment. If the defendant is incarcerated, the defendant agrees to participate in the Bureau of Prisons' Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a schedule of payments.

16. *Detention/Release After Plea:*

Pursuant to 18 U.S.C. § 3143(a)(2), the defendant acknowledges that he will be detained upon conviction unless (A)(i) the Court finds there is a substantial likelihood that a motion for acquittal or new trial will be granted *or* (ii) this agreement provides that the United States will recommend that no sentence of imprisonment be imposed *and* (B) the Court finds, by clear and convincing evidence, that he is not likely to flee or pose a danger to any other person or the com-

munity. Then, if exceptional circumstances exist, the defendant may be released upon conditions.

17. *Entire Agreement:* Any statements or representations made by the United States, the defendant, or his counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. **This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.**

MICHAEL W. COTTER
United States Attorney

/s/ E. VINCENT CARROLL
E. VINCENT CARROLL
Assistant U. S. Attorney

/s/ MICHAEL BRYANT JR
MICHAEL BRYANT, JR.
Defendant

/s/ STEVEN C. BABCOCK
STEVEN C. BABCOCK
Defense Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR 11-70-BLG-JDS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL BRYANT, JR., DEFENDANT

Jan. 12, 2012

OFFER OF PROOF

On January 9, 2012, the defendant filed a motion, *see* Doc # 26, indicating his intent to plead guilty to the indictment, which charges two counts of domestic assault by an habitual offender, each a violation of Title 18 U.S.C. § 117(a). The defendant intends to plead guilty pursuant to a conditional plea agreement, which was filed on January 10, 2012. *See* Doc. # 27. The elements of each offense are:

> **First**, the crime occurred on the Northern Cheyenne Indian Reservation;
>
> **Second**, the defendant intentionally committed a domestic assault; and
>
> **Third**, the defendant has at least two separate prior convictions in tribal court, that would be, if subject to federal jurisdiction, an assault against an intimate partner.

If called upon to prove the case at trial, the United States would have presented the following evidence.

The defendant, Michael Bryant, Jr., is a 48 year-old male, and is an enrolled member of the Northern Cheyenne Tribe of Indians. Each offense took place within the exterior boundaries of the Northern Cheyenne Indian Reservation.

On February 28, 2011, C.L.O. was living with the defendant in Birney, MT, on the Northern Cheyenne Indian Reservation. The defendant grabbed C.L.O. and dragged her off their bed onto the floor. The defendant then pulled C.L.O.'s hair, repeatedly punched and kicked her, and bit her fingers. The defendant then threatened C.L.O. that if she told anyone what had happened he would hurt her.

On May 7, 2011, D.E. was living with the defendant in Birney, MT, on the Northern Cheyenne Indian Reservation. The defendant woke D. E. by yelling at her because he could not find his truck keys. The defendant proceeded to choked D.E. until she almost passed out.

The defendant was interviewed and admitted to the above assaults. The defendant has at least two prior domestic assault convictions in tribal court.

The United States would have presented this evidence through the testimony of law enforcement and witnesses. Additionally, the United States would have presented a tribal enrollment record for the defendant to prove that he is an Indian person.

DATED this 12th day of January, 2012.

MICHAEL W. COTTER
United States Attorney

/s/ E. VINCENT CARROLL
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR 11-70-BLG-JDS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL BRYANT, JR., DEFENDANT

May 9, 2012
9:19 a.m.

TRANSCRIPT OF SENTENCING HEARING

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[3]

THE COURT: We'll have the matter of Michael Bryant.

Mr. Bryant, do you read and write the English language?

THE DEFENDANT: Excuse me?

THE COURT: Do you read and write the English language fluently?

THE DEFENDANT: Oh, yes, yes.

THE COURT: And you have a copy of the presentence report on the podium, and you've had the opportunity to go through that with your attorney, Mr. Babcock?

THE DEFENDANT: Yes.

THE COURT: And you indicate that you have no objections and the Court can rely upon the accuracy of the report?

MR. BABCOCK: That's correct, Your Honor. I just want to point out one thing, that on page 5 of the presentence report, this does not affect the guideline range at all—taking a look at paragraph number 16—

THE COURT: Number what?

MR. BABCOCK: Number 16, Your Honor, on page 5. There's some statements in there about some things that were allegedly done in a sexual nature in this case. Michael objects to those statements. It should not affect anything in regards to his guidelines or what he's pled to as far as the [4] actual offense conduct in this case.

With that, Your Honor, we have no further objections.

THE COURT: Okay. And the Government has no objections?

MS. HURD: No, Your Honor.

THE COURT: For the purposes of the guideline, then, under paragraph 51, the victim of Count I is initial C.L.O. And base offense level for this is found in USSG 2A6.2. Calls for a base offense level of 18. There is a 4-point enhancement under specific offense characteristics. And that is that the offense involved one of the following aggravating factors: A violation of the court protection order; bodily injury, or received—possession, or threatened use, of a dangerous weapon; or pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by 2 levels. If the offense involved more than one of these aggravated factors, increase by 4.

This did include more than one, so we will increase it by 4. Bodily injury to C.L.O. and engaged in a pattern of stalking, threatening, harassing, or assaulting this victim.

In fact, you admitted that you got physical with C.L.O., during the time they were together, between five and six times.

So we have a base level, then, of 22 and have a [5] separate count, domestic assault by a habitual offender. And again, under 2A6.2, calls for a base offense level of 18, an enhancement of 4 because it involved one of the following aggravating factors: Again, a violation of a court protection order; or two, bodily injury; three, possession or threatened use of a dangerous weapon; or four, a pattern of activity involving stalking, threatening, harassing,

or assaulting the same victim, increase by 2 levels. If the offense involves more than one of these aggravating factors, increase by 4.

And it is increased by 4, as defendant caused bodily injury to C.L.O. and engaged in a pattern involving stalking, threatening, or harassing. So we have a level 22.

And under the multiple count adjustment under USSG 3D1.4, why, we enhance it by 2. You now have a combined adjusted offense level of 24. With 3-point reduction for acceptance of responsibility, puts you at a total offense level of 21.

And at a level 21 with a criminal history of I, puts you in the advisory guideline range of 37 to 46 months on each count.

MR. BABCOCK: Thank you. I don't remember. We would respectfully request a sentence in this case within the advisory guidelines, specifically at the low end. He has been incarcerated, at this point, by the calculations in the presentence report, for 352 days. If you take a look at the [6] nature and circumstances of this offense, along with the characteristics of Michael in the past, it is amazingly clear that he has a major problem with alcohol. And that's said in a lot of cases, but it's certainly clear in this case.

In taking a look at what was involved in what he's been charged with in these cases, he certainly needs help. And we would ask for a recommendation with the Bureau of Prisons to the RDAP program. He certainly needs it. I can tell the Court, in my time of representing Michael, I don't think I've ever seen in anybody, anybody that has benefited by time being away from alcohol more than him.

He's thinking way more clear than he was in the past. He looks way better.

And I think that he certainly understands that he cannot keep going down the path that he has been for the majority part of his life. He has a lot of potential. He's got very strong family responsibility. There's been character letters I've submitted to the Court. His parents are here today. And in talking with his parents before court—they're elderly, and they certainly need him at home to help.

He does have the ability to go to work, and he does have the ability to stay sober as long as he is receiving treatment. And that's what he wants to get in this case.

Your Honor, we're going to be asking, once again, for a guideline sentence at the low end with placement—a recommendation in Sheridan, Oregon. They do have the RDAP [7] program there. They have vocational programs that Michael is interested in that we have talked about.

This is an individual that can do well in the future as long as he achieves sobriety and maintains it. I think at this point, after being incarcerated for as long as he has been already, that he knows that he's just a person that cannot drink ever again. And I think he's very serious with that commitment. Thank you.

MS. HURD: Your Honor, on behalf of Mr. Carroll, whose case this is, I was reviewing the presentence report. And the level of violence that this man shows to the women with whom he becomes involved is staggering, along with his past criminal history in tribal court. I stopped counting at a hundred different entries on his criminal history, the majority of which appear to be alcohol related. He certainly has an alcohol problem that

he needs treatment for and anger management problem that he needs treatment for.

We do agree that a sentence within this advisory guideline range is appropriate. But the United States believes the defendant has earned a sentence at the high end of that guideline range followed by the maximum term of supervised release.

THE COURT: This is your opportunity, Mr. Bryant, to address the Court with any comments that you might want.

THE DEFENDANT: I just want to say that I'm sorry [8] that this happened. And I want to apologize to the victims and their families. And also, like my lawyer says, I know I need alcohol treatment. And I want to go through that. And I know that when I get done with treatment, I'll be a better person. And also, I am truly sorry for what happened. Thank you.

THE COURT: All right. Pursuant to Section 18 USC, then, after considering 3553(a) of the sentencing guidelines and policy statements, it is the judgment of the Court that the defendant, Michael Bryant, Jr., is hereby committed to the custody of Bureau of Prisons for a term of 46 months. This term consists of 46 months for Count I and 46 months for Count II, both counts to run concurrent.

And I'm going to order you, if eligible, to get into the 500-hour residential drug treatment program.

Upon release from imprisonment, you'll be placed on supervised release for a term of three years. This term consists of three years for Count I and three years for Count II, both counts to run concurrent.

Within 72 hours of release from the custody of the Bureau of Prisons, you'll report, in person, to the probation officer in the district to which you are released.

While on supervised release, you will not commit any federal, state, or local crime. You shall not possess a controlled substance. You'll be prohibited from owning, [9] using, or being in constructive possession of firearms, ammunition, or other destructive devices while on supervision and anytime after the completion of the period of supervision, unless granted relief by the Secretary of the Treasury.

And you must cooperate in the collection of DNA as directed by the probation officer.

And you must comply with the standard conditions of supervised release as represented by the U.S. Sentencing Commission and have been approved by this Court and the following special conditions: One, you'll participate in substance abuse testing to include not more than 104 urinalysis tests and not more than 104 Breathalyzer tests annually during the period of supervision.

The defendant is to pay all or part of the cost of testing as to be determined by the probation officer.

You'll participate in and complete a program of substance abuse and treatment as approved by the probation officer and continue in it until release from the program by the probation officer.

You'll abstain from the consumption of alcohol and shall not enter establishments where alcohol is the primary item of sale.

You shall not purchase, possess, use, distribute, or administer marijuana or obtain or possess a medical marijuana card or prescription. You'll surrender your medical marijuana [10] card to the U.S. Probation.

You'll participate in the program for mental health treatment as deemed necessary by the U.S. probation officer and continue until such time as you're released from the program by the probation officer.

You'll comply with the violent offender registration requirements for convicted offenders in any state in which you might reside.

You'll submit your person, residence, place of employment, or vehicle to a search conducted by the U.S. Probation Office, based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation.

You shall not ingest or inhale any toxic substances, such as, but not limited to, synthetic marijuana and/or synthetic stimulants that is not manufactured for human consumption, for the purpose of altering your mental or physical state.

I find that you do not have the ability to pay a fine. I'll waive the fine. But there is a special assessment of $100, which is due immediately. And you did reserve, in the plea agreement, the right to appeal the adversary pretrial rulings denying your motion to dismiss this indictment.

MR. BABCOCK: Thank you, Your Honor.

MS. HURD: Your Honor, I believe there were two [11] counts, so the special assessment should be $200 rather than $100.

MR. BABCOCK: That's correct, Your Honor.

(Sentencing Hearing adjourned at 9:33 a.m., May 9, 2012.)

* * * * *

[SEAL OMITTED]

U.S. Department of Justice

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July 7, 2014
Molly C. Dwyer
Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

RE: *United States v. Bryant*, CA 12-30177

Dear Ms. Dwyer:

This is to inform the Court prior to oral argument on July 10, 2014, of the government's concession that there were not two or more of Bryant's prior tribal court convictions for domestic abuse that involved no sentence of incarceration. In its supplemental brief, the United States argued to the Court that Bryant was "sentenced without prison time on several occasions[.]" Supplemental Brief at 11. Upon further investigation, the United States advises the Court that there were not two or more such prior convictions where no term of imprisonment was imposed.

Sincerely,

MICHAEL W. COTTER
United States Attorney

/s/ LEIF M. JOHNSON
LEIF M. JOHNSON
Assistant U. S. Attorney

No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 117(a) of Title 18 of the United States Code makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic-violence offenses. 18 U.S.C. 117(a) (Supp. II 2014).

The question presented is whether reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

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In the Supreme Court of the United States

No. 15-420

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 769 F.3d 671. The opinions accompanying the order of the court of appeals denying rehearing en banc (Pet. App. 34a-54a) are reported at 792 F.3d 1042. The oral ruling of the district court denying respondent's motion to dismiss the indictment (Pet. App. 22a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2014. A petition for rehearing was denied on July 6, 2015 (Pet. App. 33a). The petition for a writ of certiorari was filed on October 5, 2015, and was granted on December 14, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Montana, respondent was convicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). Pet. App. 3a. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. J.A. 45-46. The court of appeals reversed the convictions and directed that the charges be dismissed because, the court held, the Constitution prohibited reliance on respondent's valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element. Pet. App. 1a-21a.

A. Statutory Background

1. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). Thus, when an Indian tribe conducts a criminal prosecution in tribal court for crimes occurring in Indian country, it "acts as an independent sovereign, and not as an arm of the Federal Government." *United States* v. *Wheeler*, 435 U.S. 313, 329 (1978); see *United States* v. *Lara*, 541 U.S. 193, 210 (2004). Because a tribe's power to enforce tribal law emanates from "retained tribal sovereignty," *Wheeler*, 435 U.S. at 323-324, tribal

prosecutions are not governed by provisions of the federal Constitution. *Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); see *Duro* v. *Reina*, 495 U.S. 676, 693 (1990) ("[T]he Bill of Rights does not apply to Indian tribal governments.").

Although the Constitution does not apply to tribal prosecutions, Congress has exercised its "broad general power[] to legislate in respect to Indian tribes," *Lara*, 541 U.S. at 200, by conferring a range of procedural safeguards on tribal-court defendants in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.* See *Santa Clara Pueblo*, 436 U.S. at 56-57. Under ICRA, a tribal-court defendant is guaranteed "due process of law" and has "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him," to "have compulsory process for obtaining witnesses in his favor," and, for an offense punishable by imprisonment, to have a trial by jury. 25 U.S.C. 1302(a)(6), (8), and (10). ICRA also provides protection from compelled self-incrimination, unreasonable searches and seizures, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2)-(4) and (7). In addition, tribal-court defendants may seek habeas corpus review of their convictions in federal district court. 25 U.S.C. 1303.

ICRA requires tribal courts to provide counsel for indigent defendants who are sentenced to a term of imprisonment exceeding one year, but appointed

counsel is not required when a sentence of less than one year is imposed. 25 U.S.C. 1302(c)(2). Instead, a defendant in a misdemeanor prosecution has the right to the assistance of counsel at his own expense. 25 U.S.C. 1302(a)(6). ICRA's counsel provision thus differs from the Sixth Amendment. While the Sixth Amendment provides no right to appointed counsel in misdemeanor cases where only a fine is imposed, it does provide the right to appointed counsel in a misdemeanor prosecution that results in actual imprisonment. See *Scott* v. *Illinois*, 440 U.S. 367, 369, 373-374 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

2. The Northern Cheyenne Tribe is a federally recognized Indian tribe in Montana with more than 10,000 enrolled members. See Northern Cheyenne Tribe, *Official Site of the Tsitsistas & So'taeo'o People* (2013), www.cheyennenation.com. The Tribal Constitution establishes three branches of government—legislative, executive, and judicial—and provides for the separation of powers. See Am. Const. and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Art. XI (adopted May 31, 1996).[1]

The Tribe's Judicial Branch is composed of a Trial Court, Appellate Court, Constitutional Court, and Office of the Court Clerk. Law and Order Code of the Northern Cheyenne Tribe, Tit. I, § 1-1-4 (1998) (Tribal Code).[2] The Trial Court exercises general civil and criminal jurisdiction. *Id.* § 1-2-1. The Appellate Court "has exclusive jurisdiction to hear appeals and other

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[1] http://indianlaw.mt.gov/content/northerncheyenne/codes/2008_updated_law_and_order_code/attachment.pdf.

[2] http://indianlaw.mt.gov/northerncheyenne/codes/default.mcpx.

authorized requests for appellate review of Trial Court decisions." *Id.* § 1-2-2. The Constitutional Court has authority to remove judges and "has exclusive jurisdiction" over claims that legislative enactments of the Tribal Council violate the Tribal Constitution. *Id.* § 1-2-3.

The Tribe has adopted rules of criminal procedure "intended to provide for a fair trial and the just determination of every criminal proceeding" in tribal court. Northern Cheyenne R. Crim. P. 1(B) (Tribal Code, Tit. V). Criminal defendants are presumed innocent and may only be convicted if the evidence shows beyond a reasonable doubt that the defendant committed the charged crime. Rule 26(K)(2). Criminal defendants have "[t]he right to be present throughout the proceeding"; "[t]he right to know the nature and cause of the charge and to receive a copy of the complaint"; "[t]he right to meet the witnesses against [them] face to face"; "[t]he right to compulsory process"; "[t]he right to a speedy public trial and by an impartial jury if a prison sentence is possible"; and "[t]he right not to testify." Rule 22(A)(1)-(6). The Rules further provide that the defendant has the right "to defend himself in person, by lay counsel or professional attorney at his own expense." Rule 22(A)(1).

If a Northern Cheyenne tribal-court defendant chooses to plead guilty, the judge must personally address the defendant in open court to determine that the plea is informed, voluntary, and accurate. Rule 11(B)(1) and (4). The judge must explain and determine that the defendant understands his rights, including the "right to be represented at his own expense." Rule 11(B)(1)(b). The judge "shall not enter a judgment on a tendered plea of guilty without first

making an inquiry to satisfy himself that there is a factual basis for the plea." Rule 11(B)(4).

3. In 2006, in response to an epidemic of domestic violence against Indian women and to ensure that serial offenders would be held accountable, Congress enacted 18 U.S.C. 117(a), which makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for specified domestic-assault offenses. See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. No. 109-162, §§ 901, 902(3), 119 Stat. 3077-3078.[3] At the time of the events in this case, qualifying predicates included offenses equivalent to "assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner," as well as certain interstate domestic violence and stalking crimes. 18 U.S.C. 117(a)(1) (2006). The statute was later expanded to also include domestic violence offenses committed against "a child of or in the care of the person committing the domestic assault" as qualifying predicates. 18 U.S.C. 117(a)(1) (Supp. II 2014).

B. The Current Controversy

1. a. Respondent is an enrolled member of the Northern Cheyenne Tribe who lived on the Northern Cheyenne Indian Reservation during the time period

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[3] "Indian country" is defined in 18 U.S.C. 1151 to mean all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.

relevant to this case. Pet. App. 3a & n.2; J.A. 38. Respondent has more than 100 tribal-court convictions for various criminal offenses, including several misdemeanor convictions for domestic assault. See Presentence Investigation Report (PSR) ¶ 81. Specifically, between 1997 and 2007, respondent pleaded guilty on at least five occasions in the Northern Cheyenne Tribal Court to committing domestic abuse, in violation of Section 7-5-10 of Title VII of the Tribal Code. See PSR ¶¶ 26, 81.[4] In 1999, for example, respondent assaulted his live-in girlfriend by attempting to strangle her and hitting her on the head with a beer bottle. PSR ¶ 81. And in 2007, respondent beat up his girlfriend and kneed her in the face, leaving her bruised, bloodied, and with a broken nose. *Ibid.* The Tribal Court sentenced respondent to various terms of imprisonment for his repeated acts of domestic violence, never exceeding one year of incarceration. *Ibid.* Respondent did not seek federal habeas corpus review of any of his tribal-court convictions for domestic assault.

Respondent has alleged, and the courts below have assumed, that he was indigent and that he did not have access to appointed counsel at the time of his

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[4] Section 7-5-10 provides that "[a]ny person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse." Tribal Code, Tit. VII, § 7-5-10(A). The provision contains graduated penalties intended to punish repeat offenders. See *id.* § 7-5-10(C) (providing that a first-time offender "shall be jailed for not less than 30 days and fined not less than $500.00," a second-time offender "shall be jailed for not less than 90 days and fined not less than $1,000.00," and a third-time offender "shall be jailed for not less than 180 days and fined not less than $2,000.00").

tribal-court convictions. See Pet. App. 5a & n.4. It is undisputed, however, that those convictions were valid when rendered and were obtained in compliance with ICRA. *Id.* at 7a-8a, 46a.

b. Respondent's pattern of domestic violence continued in 2011 with assaults on two different women. In February 2011, respondent attacked his live-in girlfriend in his home on the Northern Cheyenne Indian Reservation by dragging her off the bed, pulling her hair, and punching and kicking her. J.A. 38; see PSR ¶ 11 (quoting victim's affidavit stating that respondent had repeatedly abused her over a four-month period and that the violence escalated with the February 2011 attack). Three months later, in May 2011, respondent assaulted a different woman who was living with him on the Reservation. J.A. 38. Respondent woke her, yelled at her, and then choked her until she almost passed out. *Ibid.*

On May 9, 2011, federal and tribal law enforcement officers interviewed respondent about his recent acts of violence. PSR ¶ 28. During that interview, respondent admitted that he physically assaulted the woman involved in the February 2011 attack between five and six times. PSR ¶ 35. He recalled that he had "slapped [her] in the face several times" during the February 2011 assault and "punched [her] a few times," including "once to her chest which knocked her to the ground." PSR ¶ 34. Respondent further admitted that he had physically assaulted the victim of the May 2011 attack "on three separate occasions" during the two months they dated. PSR ¶¶ 28, 33. Respondent stated that he had "punched, slapped or choked" the victim during those attacks. PSR ¶ 33.

2. a. Based on the February and May 2011 assaults, a federal grand jury in the United States District Court for the District of Montana returned an indictment charging respondent with two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). J.A. 25-26. Respondent moved to dismiss the indictment, alleging that the use of his uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element would violate the Fifth and Sixth Amendments. C.A. E.R. 27-29. The district court denied the motion. Pet. App. 32a. Respondent pleaded guilty to both counts in the indictment, reserving his right to appeal the denial of his motion to dismiss. J.A. 27-36.

b. In advance of sentencing, the Probation Office prepared a PSR. The PSR recommended a four-level enhancement to the base offense level for each violation of 18 U.S.C. 117(a) because respondent had repeatedly assaulted his victims and inflicted bodily injury on them. PSR ¶¶ 52, 58 (calculating enhancement pursuant to Sentencing Guidelines § 2A6.2(b)(1) (2010)). The PSR also summarized respondent's lengthy tribal-court record, including his multiple convictions for domestic assault. PSR ¶ 81. Respondent objected to a handful of facts in the PSR, but he did not dispute any aspect of his tribal-court record or the facts underlying the assaults that resulted in his Section 117(a) prosecution. See 4/27/12 Add. to PSR.

c. At sentencing, respondent confirmed that he had no further relevant objections to the PSR and that the district court "c[ould] rely upon the accuracy of the report." J.A. 41-42. The court calculated a total offense level of 21 for each Section 117(a) violation, which included a four-level enhancement under Sen-

tencing Guidelines § 2A6.2(b)(1) (2010) for causing bodily injury to and repeatedly assaulting the victims. J.A. 42-43. That offense level, combined with respondent's criminal history category of I, yielded a recommended Guidelines range of 37 to 46 months of imprisonment. J.A. 43. The court sentenced respondent to concurrent terms of 46 months of imprisonment on each count, to be followed by three years of supervised release. J.A. 45-46.

3. a. The court of appeals reversed. Pet. App. 1a-21a. The court held that the indictment must be dismissed because, in its view, the Sixth Amendment did not permit reliance on respondent's uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element. *Id.* at 16a.

The court of appeals acknowledged that respondent's uncounseled tribal-court convictions were not constitutionally infirm because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." Pet. App. 7a. But the court stated that respondent's convictions "would have violated the Sixth Amendment had they been obtained in state or federal court" because respondent was incarcerated for his tribal offenses, and "indigent criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed." *Id.* at 8a. The court found it "constitutionally impermissible" to use respondent's uncounseled tribal-court convictions as predicate offenses under Section 117(a) because the tribal court had not "guarantee[d] a right to counsel that is * * * coextensive with the Sixth Amendment right." *Id.* at 12a.

In so concluding, the court of appeals relied heavily on its prior decision in *United States* v. *Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which had found it impermissible to use an uncounseled tribal-court guilty plea that resulted in imprisonment as evidence in a later federal prosecution arising out of the same incident. Pet. App. 10a-11a. The court acknowledged that *Ant* had cited *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), in which a majority of a fractured Court held without agreeing on a rationale that "an uncounseled conviction that did not result in imprisonment—and therefore did not run afoul of the Sixth Amendment—could [not] be used in a subsequent prosecution under a recidivist statute." Pet. App. 9a, 13a. And the court recognized that this Court had subsequently overruled *Baldasar* in *Nichols* v. *United States*, 511 U.S. 738, 746-747 (1994), which held that an uncounseled state misdemeanor conviction that did not result in imprisonment *could* be used to enhance a sentence for a subsequent offense. Pet. App. 12a-13a. But the court believed that *Ant* "remains good law notwithstanding its citation to *Baldasar*." *Ibid.*

The court of appeals recognized that its decision created a conflict with two other circuits, both of which had "held that a prior uncounseled tribal court conviction could be used as a predicate offense for a [Section] 117(a) prosecution." Pet. App. 14a (citing *United States* v. *Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), and *United States* v. *Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012)). But the court disagreed with those decisions, believing they could not "be reconciled with *Ant*." *Id.* at 15a.

b. Judge Watford concurred. Pet. App. 16a-21a. He agreed that *Ant* "control[led] the outcome of" respondent's case, but wrote separately to explain why "*Ant* warrants reexamination." *Id.* at 16a-17a. As Judge Watford observed, "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Id.* at 17a. Judge Watford found it "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." *Id.* at 17a-18a.

Judge Watford also explained that *Nichols* had "undermine[d] the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." Pet. App. 17a. The view that "the right to appointed counsel is necessary to ensure the reliability of all *tribal* court convictions" therefore "denigrat[ed] the integrity of tribal courts." *Id.* at 19a-20a. Judge Watford observed that "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that uncounseled "tribal court convictions are inherently suspect and unworthy of the federal courts' respect." *Ibid.*

Judge Watford noted that *Ant* was also vulnerable to challenge in light of this Court's decision in *Lewis* v. *United States*, 445 U.S. 55 (1980), which held that an uncounseled felony conviction obtained in violation of the Sixth Amendment could be used as a predicate in a subsequent prosecution for being a felon in possession of a firearm. Pet. App. 18a. *Lewis* held that

"the mere fact of conviction, even if unreliable and unconstitutionally obtained, could be used to criminalize an act that might otherwise be lawful—firearms possession." *Id.* at 19a (citation and internal quotation marks omitted). Judge Watford thought it "illogical" to hold that, in contrast, "the 'mere fact' of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence." *Ibid.* As Judge Watford noted, it does not "imping[e] upon anyone's rights when [a legislature] prohibit[s] (or enhance[s] penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Ibid.*

4. The court of appeals denied rehearing en banc, over the dissent of eight judges. Pet. App. 33a-54a.

a. Concurring in the denial of rehearing en banc, Judge Paez stated that *Nichols* should not be read to "permit[] the use of [respondent's] convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do)." Pet. App. 34a. Judge Paez suggested that uncounseled tribal-court convictions present reliability concerns and that *Nichols*, which involved an enhancement under the federal Sentencing Guidelines, "leaves open the question" whether such a conviction "passes muster at the guilt phase." *Id.* at 36a.

b. Judge Owens dissented from the denial of rehearing en banc. Pet. App. 40a-43a. He observed that Congress enacted Section 117(a) to address "the grave problem of domestic violence on tribal lands." *Id.* at 40a. Respondent is precisely the kind of offender Congress intended Section 117(a) to cover, Judge Owens explained, because he had been convicted of domestic violence on numerous occasions in tribal

court but faced only repeated misdemeanor-level punishment. *Ibid.* Judge Owens emphasized that the panel's decision had effectively "wiped this important statute off the books" and had "torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse." *Id.* at 41a.

Judge Owens further explained that the panel's decision was incorrect because an uncounseled misdemeanor conviction is valid even if an accompanying sentence of imprisonment is not. Pet. App. 42a. "By holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence," Judge Owens stated, "the panel splits with every circuit to seriously consider this issue." *Id.* at 41a.

c. Judge O'Scannlain authored a separate dissent from the denial of rehearing en banc. Pet. App. 44a-54a. The panel's decision, he explained, "contravenes * * * *Nichols v. United States* * * * and, ultimately, holds tribal courts in contempt for having the audacity to follow the law as it is, rather than the law as [the panel] think[s] it should be." *Id.* at 45a. As Judge O'Scannlain observed, "[b]oth Nichols's and [respondent's] uncounseled convictions comport with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a (internal quotation marks omitted). Judge O'Scannlain deemed it irrelevant that "the prior tribal court proceedings *would* have violated the Sixth Amendment *if* they were in state or federal court" because "using a federal recidivist statute to prosecute [respondent] does not transform his prior, valid, tribal court

convictions into new, invalid, federal ones." *Ibid.* (citation and internal quotation marks omitted).

Judge O'Scannlain further emphasized that *Nichols* had necessarily held that "uncounseled convictions in general *are not* unreliable." Pet. App. 52a. "If an uncounseled but valid *state* court conviction can support a later federal prosecution under a recidivist statute," Judge O'Scannlain could not perceive why "an uncounseled but valid *tribal* court conviction cannot do the same." *Id.* at 49a. He concluded that the panel's opinion "must rest on an assumption that tribal court convictions are inherently unreliable," which "trample[s] upon the principles of comity and respect that undergird federal court recognition of tribal court judgments." *Id.* at 52a (emphasis omitted).

SUMMARY OF ARGUMENT

Reliance on valid, uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element accords with the Constitution.

A. The Sixth Amendment does not bar the use of valid, uncounseled tribal-court misdemeanor convictions in a Section 117(a) prosecution.

1. This Court's precedents establish that the Sixth Amendment's constraints on the collateral use of a prior conviction turn on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. If it did, the conviction cannot be used subsequently because its use would perpetuate the preexisting constitutional violation and erode right-to-counsel principles. *Burgett* v. *Texas*, 389 U.S. 109, 115-116 (1967). But if an uncounseled conviction did not violate the Sixth Amendment when it was ob-

tained, it also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a prosecution for a subsequent offense. *Nichols* v. *United States*, 511 U.S. 738, 746-747 (1994). The use of such a conviction neither exacerbates a prior constitutional violation nor creates a Sixth Amendment defect where one did not previously exist.

2. Respondent's uncounseled tribal-court convictions did not violate the Sixth Amendment when they were obtained because the Bill of Rights does not apply to Indian tribes when they invoke their sovereign authority to conduct criminal prosecutions. Under *Burgett* and *Nichols*, it follows that the Sixth Amendment was not violated when the government relied on those valid convictions to prove Section 117(a)'s predicate-offense element.

3. In holding to the contrary, the court of appeals reasoned that respondent's tribal-court convictions would have violated the Sixth Amendment had they been obtained in state or federal court because respondent was sentenced to imprisonment and the Sixth Amendment, where it applies, guarantees a right to appointed counsel in a misdemeanor prosecution resulting in actual imprisonment. But the court identified no reason to distinguish uncounseled convictions that do not violate the Sixth Amendment because it does not apply in the jurisdiction from uncounseled convictions that do not violate the Sixth Amendment for other reasons—for example, because the defendant was not imprisoned, was not entitled to appointed counsel because he was not indigent, or had waived his right to appointed counsel. And, in any event, the court erred in believing that respondent's uncounseled convictions would have been unlawful if imposed in

state or federal court, because the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but rather only any accompanying sentence of imprisonment.

4. Nor can "the Sixth Amendment's core interest in reliability" justify the court of appeals' holding. Pet. App. 36a (Paez, J., concurring in the denial of rehearing en banc). *Scott* v. *Illinois*, 440 U.S. 367 (1979), and *Nichols*, 511 U.S. 738, demonstrate that uncounseled misdemeanor convictions are not deemed categorically unreliable, but instead may be used to establish guilt beyond a reasonable doubt, impose a criminal fine, and subject the defendant to a variety of collateral consequences—including being classified as a recidivist in a subsequent proceeding.

It would make little sense to treat a tribal-court misdemeanor conviction as categorically unreliable if the tribal court imposed a sentence of imprisonment, but not if it imposed a lesser penalty such as a fine. In the latter circumstance, the Ninth Circuit's rationale would permit reliance on an uncounseled tribal-court misdemeanor conviction because the defendant would not have had a right to appointed counsel had he been prosecuted in state or federal court. But the tribal court's sentencing determination does not render the underlying uncounseled conviction any more or less reliable. The court of appeals' Sixth Amendment holding accordingly cannot be justified based on imputing unreliability to uncounseled tribal-court findings of guilt.

B. The Due Process Clause likewise does not preclude reliance on an uncounseled tribal-court misdemeanor conviction to prove Section 117(a)'s predicate-offense element.

1. Congress has broad authority to define criminal offenses and to make the fact of a prior conviction an element of an offense. Even though Congress is presumed to be aware that tribal-court defendants do not have a right to counsel equivalent to the Sixth Amendment right, Congress has made all tribal-court convictions qualifying predicates for a prosecution under Section 117(a). That legislative choice must be upheld unless it lacks a rational basis. *Lewis* v. *United States*, 445 U.S. 55, 66 (1980).

2. Congress could rationally conclude that permitting tribal-court convictions to satisfy Section 117(a)'s predicate-offense element was essential to its effort to combat domestic violence in Indian country. Excluding uncounseled tribal-court convictions resulting in imprisonment would have left the statute significantly less effective in deterring and punishing habitual offenders. Congress enacted Section 117(a) in response to an epidemic of domestic violence in Indian country and a jurisdictional void that permitted repeat offenders—who often were subject only to tribal misdemeanor jurisdiction—to escape felony-level sanctions again and again. In making a predictive judgment about the class of offenders who are most likely to perpetuate the cycle of violence in Indian country, Congress could rationally rely on the fact that an offender had at least two prior tribal-court convictions for domestic violence, whether or not those convictions were counseled and whether or not they resulted in imprisonment.

3. Respondent is wrong to suggest that speculation about unreliability in tribal-court convictions renders Congress's judgment irrational. This Court's precedents foreclose the argument that uncounseled state

and federal convictions are necessarily unreliable—and no reason justifies a different conclusion with respect to uncounseled tribal-court convictions. That is all the more true in light of the procedural protections tribal-court defendants enjoy under ICRA, which, among other things, guarantees due process and permits defendants to seek habeas corpus review of their tribal-court convictions in federal court. Principles of comity—which do not require a foreign tribunal to offer procedural protections identical to those of U.S. courts—further demonstrate that Congress rationally decided that tribal-court convictions are worthy of respect.

4. Respondent's categorical unreliability argument is refuted by the facts here, which leave no doubt that respondent repeatedly committed acts of domestic violence on the Northern Cheyenne Indian Reservation. Due process principles provide no basis for foreclosing a Section 117(a) prosecution against offenders like respondent, whose tribal-court convictions reliably indicate guilt and attest to the pressing need for federal intervention to deter and punish domestic violence in Indian country.

ARGUMENT

SECTION 117(a) IS CONSTITUTIONAL AS APPLIED TO OFFENDERS WHO HAVE VALID, UNCOUNSELED TRIBAL-COURT MISDEMEANOR CONVICTIONS

Congress enacted 18 U.S.C. 117(a) in recognition of the pervasive problem of domestic violence in Indian country, with the purpose of "decreas[ing] the incidence of violent crimes against Indian women" and "ensur[ing] that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act

§ 902(1) and (3), 119 Stat. 3077-3078. In support of those goals, Congress authorized prosecution of offenders who commit a domestic assault in Indian country and who have at least two prior final convictions for domestic violence in "Indian tribal court proceedings." 18 U.S.C. 117(a) (Supp. II 2014).

The Ninth Circuit held that the statute is unconstitutional as applied to repeat offenders who have prior, uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. That holding is erroneous. Nothing in the Constitution prohibits reliance on valid tribal-court misdemeanor convictions, whether or not they were counseled and whether or not they resulted in imprisonment, to prove the predicate-offense element in a Section 117(a) prosecution. The Ninth Circuit's decision contravenes this Court's precedent and frustrates Congress's clear intention to combat the recurring and entrenched problem of domestic violence in Indian country.

A. The Sixth Amendment Does Not Preclude Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions To Prove Section 117(a)'s Predicate-Offense Element

This Court's precedents establish that a conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding. Respondent's tribal-court convictions were validly entered in accordance with tribal and federal law. The court of appeals accordingly erred in holding that the Sixth Amendment prohibited their use in his Section 117(a) prosecution.

1. This Court's decisions establish that an uncounseled conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used in a subsequent proceeding

a. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. In *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), the Court held that the Sixth Amendment encompasses the right to appointment of counsel for indigent defendants in felony prosecutions, unless the defendant knowingly and intelligently waives that right. See also *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). In *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972), the Court extended that right to misdemeanors that result in imprisonment. See *id.* at 40 ("Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed * * * unless the accused is represented by counsel."). The *Argersinger* Court anticipated that the "run of misdemeanors w[ould] not be affected" by that extension because many misdemeanor prosecutions do not result in a sentence of incarceration. *Ibid.* "But in those that end up in the actual deprivation of a person's liberty," the Court observed, "the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Ibid.* (citation omitted).

In *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Court confirmed that the Sixth Amendment guarantees an indigent defendant's right to appointed counsel in

misdemeanor prosecutions only when a term of imprisonment is imposed. *Id.* at 373-374. The defendant in *Scott* was convicted of theft in state court and fined $50. *Id.* at 368. This Court rejected his argument that the State was required to provide counsel at its expense because imprisonment was authorized, although not ultimately imposed, for his theft offense. *Id.* at 368, 373-374. As the Court explained, "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373. Accordingly, the Court held "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-374; see *Alabama* v. *Shelton*, 535 U.S. 654, 672 (2002) (holding that "actual imprisonment" includes the imposition of a suspended sentence of imprisonment).

b. In a series of decisions, this Court has considered whether the Sixth Amendment permits reliance on an uncounseled conviction in a subsequent prosecution. That question first arose in *Burgett* v. *Texas*, 389 U.S. 109 (1967), in which the State sought to use an uncounseled felony conviction obtained in violation of *Gideon* to subject the defendant to enhanced penalties for a subsequent crime under a recidivist statute. *Id.* at 111, 114. The Court observed that it had frequently adopted rules requiring the exclusion of evidence obtained in violation of constitutional rights, and it

held that "[t]he same result must follow" with respect to evidence of convictions obtained in violation of the right to counsel. *Id.* at 114 (discussing exclusionary rules designed to protect against coerced confessions, Fourth Amendment search-and-seizure violations, and Confrontation Clause violations). As the Court explained, it would "erode the principle of [*Gideon*]" to permit the constitutionally infirm prior conviction "to be used against a person either to support guilt or enhance punishment for another offense." *Id.* at 115. "[S]ince the defect in the prior conviction was denial of the right to counsel," the Court observed, "the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Ibid.*

In *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972), the Court applied that principle to hold that a sentence based in part on uncounseled prior convictions obtained in violation of *Gideon* must be set aside. Since then, the Court has adhered to the view that a conviction invalid under *Gideon* may not be used in recidivist sentencing. See *Custis* v. *United States*, 511 U.S. 485, 495 (1994) (recognizing "unique constitutional defect" in a *Gideon* violation, permitting collateral attack in recidivism proceedings); see also *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); cf. *Loper* v. *Beto*, 405 U.S. 473, 483-484 (1972) (plurality opinion) (relying on *Burgett* to hold that the use of a prior conviction obtained in violation of *Gideon* to impeach the defendant's credibility violated due process).

After *Burgett*, the Court confronted the question whether an uncounseled misdemeanor conviction that was valid because only a fine was imposed could be used to enhance a later sentence of imprisonment for a subsequent crime. Initially, a fractured and divided

Court answered that question "no." *Baldasar* v. *Illinois*, 446 U.S. 222, 222-224 (1980) (per curiam). But the Court later overruled that decision and answered "yes," holding in *Nichols* v. *United States*, 511 U.S. 738 (1994), that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment at the time it was obtained also did not violate the Sixth Amendment when it was used to enhance a defendant's punishment for a later offense. *Id.* at 748-749. The defendant in *Nichols* had been previously convicted, without the aid of counsel, of a state misdemeanor, for which he was fined but not imprisoned. *Id.* at 740-741. Because the defendant had not been incarcerated, the Court observed that "the Sixth Amendment right to counsel did not obtain" in the state prosecution. *Id.* at 746. The "logical consequence," the Court explained, was that the valid, uncounseled prior conviction could be used to increase the defendant's sentence for a subsequent crime, "even though" the sentence for that later crime "entail[ed] imprisonment." *Id.* at 746-747.

In so concluding, *Nichols* emphasized that the sentence of imprisonment in the subsequent prosecution could not be attributed to the prior, uncounseled state misdemeanor conviction. "Enhancement statutes," the Court explained, "whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." 511 U.S. at 747. Rather, such repeat-offender laws "penaliz[e] only the last offense committed by the defendant." *Ibid.* (citation omitted) (citing *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895), and *Oyler* v. *Boles*, 368 U.S. 448,

451 (1962)); see, *e.g.*, *United States* v. *Rodriquez*, 553 U.S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute * * * 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.'") (citation omitted). Thus, *Nichols* held that "consistent with the Sixth and Fourteenth Amendments of the Constitution, * * * an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-749.

That holding, *Nichols* recognized, was inconsistent with the splintered decisions in *Baldasar*, which had concluded, without agreeing on a rationale, that a prior uncounseled misdemeanor conviction that was valid under *Scott* because only a fine was imposed could nevertheless not be used to establish a defendant's recidivist status in a subsequent prosecution that had resulted in imprisonment. *Baldasar*, 446 U.S. at 223-224. Dissenting in *Baldasar*, Justice Powell observed that the majority's result "ignore[d] the significance of the constitutional validity of [the defendant's] first conviction" and "misapprehend[ed] the nature of enhancement statutes," which "do not alter or enlarge a prior sentence." *Id.* at 232. The majority's rule was "analytically unsound," Justice Powell explained, because it "create[d] a special class of uncounseled misdemeanor convictions" that "are valid for the purposes of their own penalties" but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232, 234. The *Nichols* Court "agree[d] with the dissent in *Baldasar*" that "a logical consequence of the holding [in

Scott] is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense." 511 U.S. at 746-747. The Court accordingly "adhere[d] to *Scott* * * * and overrule[d] *Baldasar.*" *Id.* at 748.

c. As lower courts have recognized, the rule that a prior conviction may be used in a subsequent prosecution if the conviction was lawful under the Sixth Amendment applies in a range of circumstances where a defendant is validly convicted without the aid of counsel. For example, courts have held that an uncounseled conviction that resulted in imprisonment may subsequently be relied upon if the defendant waived his right to appointed counsel in the prior prosecution. See, *e.g.*, *United States* v. *Feliciano*, 498 F.3d 661, 666 (7th Cir. 2007) (stating that "uncounseled cases resulting in imprisonment" that were "based on a valid waiver of the right to counsel" can be used later without "rais[ing] constitutional concerns"); *United States* v. *Early*, 77 F.3d 242, 245 (8th Cir. 1996) (per curiam) ("[A] state conviction which is uncounseled may be used to enhance a sentence as long as counsel was validly waived or was not otherwise constitutionally required."); *United States* v. *Unger*, 915 F.2d 759, 761-762 (1st Cir. 1990) (holding that the fact that a conviction "was uncounseled does not render it invalid; if the right to counsel was made clear, and was sentiently waived, the absence of counsel would not in and of itself forestall use of the ensuing conviction in tabulating the defendant's criminal history score"), cert. denied, 498 U.S. 1104 (1991).

Similarly, a defendant who was not entitled to appointed counsel in a prior proceeding because he was not indigent and who elected not to retain counsel

cannot rely on the Sixth Amendment to preclude the use of the prior conviction in a subsequent prosecution. See, *e.g.*, *United States* v. *Moles*, 79 Fed. Appx. 179, 180 (6th Cir. 2003) (permitting enhancement based on prior uncounseled convictions that resulted in imprisonment because the defendant was not indigent and chose "not to retain private counsel in the two [prior] cases"); *United States* v. *Enriquez*, 106 F.3d 414 (10th Cir. 1997) (Tbl.), 1997 WL 31567, at *2 (holding that a sentence enhancement based on a prior uncounseled conviction was permissible "in light of defendant's own sworn statement [that] he was not indigent and was able to employ counsel"); *Moore* v. *Jarvis*, 885 F.2d 1565, 1572 (11th Cir. 1989) ("[A] non-indigent defendant who eschews representation by retained counsel in one criminal proceeding has no claim * * * when, in a subsequent proceeding, the state offers a conviction obtained in the first proceeding as the predicate for an enhanced penalty under a repeat-offender statute.").

Courts have applied the same principle to uncounseled civil adjudications, where no Sixth Amendment right exists: a "valid [but uncounseled] judgment entered in [a] civil proceeding may provide the basis for treating [a defendant] as a third offender and subjecting him to the criminal penalties provided by" a recidivist statute. *Schindler* v. *Clerk of Cir. Ct.*, 715 F.2d 341, 347 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); see, *e.g.*, *State* v. *Lafountain*, 628 A.2d 1243, 1244-1246 (Vt. 1993) (rejecting argument that reliance on uncounseled civil adjudications in a criminal prosecution for a third offense violated the defendant's "constitutional rights to counsel and due process"); cf. Sentencing Guidelines § 4A1.3(a)(2)(C)

(identifying "[p]rior similar misconduct established by a civil adjudication" as a possible basis for an upward departure at sentencing).[5]

In sum, the Sixth Amendment analysis of the collateral use of a prior conviction turns not on whether the defendant had counsel in the prior proceeding or on whether he was imprisoned without the aid of counsel; instead, it hinges on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. If it did not—either because the Sixth Amendment did not apply or because the right to counsel was validly waived—no Sixth Amendment barrier prevents the use of the conviction in a subsequent prosecution.

2. Because respondent's prior tribal-court convictions were not obtained in violation of the Sixth Amendment, that Amendment does not preclude their use in a Section 117(a) prosecution

Respondent's multiple tribal-court misdemeanor convictions for domestic violence indisputably did not violate the Sixth Amendment when they were obtained. See Pet. App. 7a-8a (observing that respondent's "prior uncounseled tribal court convictions that resulted in terms of imprisonment are not unconstitutional, and [respondent] does not contend otherwise"); Br. in Opp. 6 ("Respondent did not contend his tribal court convictions were unconstitutional."). Because "the Bill of Rights does not apply to Indian tribal

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[5] Of course, a civil adjudication may be constitutionally invalid for other reasons (for example, a contempt finding premised on an indigent defendant's inability to pay a fine). But lack of appointed counsel does not prevent a court from considering the adjudication in later criminal proceedings.

governments" when they act in their sovereign capacity to conduct criminal prosecutions, *Duro* v. *Reina*, 495 U.S. 676, 693 (1990), "the Sixth Amendment right to counsel d[oes] not obtain" in those proceedings. *Nichols*, 511 U.S. at 746. The Northern Cheyenne Tribal Court accordingly lawfully convicted respondent without providing the assistance of counsel at the Tribe's expense.

Under *Burgett* and *Nichols*, it follows that the subsequent use of respondent's valid tribal-court convictions in a Section 117(a) prosecution does not contravene the Sixth Amendment. *Burgett*'s rule prohibiting the collateral use of convictions obtained in violation of *Gideon* has no application to tribal-court proceedings because *Gideon* does not govern those proceedings. Accordingly, no right-to-counsel "defect in the prior conviction" is being exploited to make the defendant "suffer[] anew" from a prior violation. *Burgett*, 389 U.S. at 115. Nor does the use of the tribal-court conviction expose *Gideon* to "serious erosion." *Id.* at 116. Reliance on a valid, uncounseled tribal-court misdemeanor conviction in a Section 117(a) prosecution "cannot violate 'anew' the Sixth Amendment" or erode its protections "because the Sixth Amendment was never violated in the first instance." *United States* v. *Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (quoting *Burgett*, 389 U.S. at 115), cert. denied, 132 S. Ct. 1742 (2012). Because uncounseled tribal-court convictions are valid for purposes of imposing punishment in tribal-court proceedings, *Nichols* demonstrates that such convictions remain valid under the Sixth Amendment when used in a Section 117(a) prosecution.

The absence of any Sixth Amendment defect is underscored by the absence of any proceeding in which respondent was entitled to, but was denied, the right to appointed counsel. As respondent concedes, he did not suffer a right-to-counsel violation at the time he was convicted of domestic violence in tribal court. See Pet. App. 7a-8a. Nor can a Sixth Amendment violation be imputed to that case retrospectively because the United States later relied on the valid tribal-court conviction in a subsequent prosecution; as *Nichols* demonstrates, respondent's federal sentence cannot be attributed to his prior, uncounseled tribal-court convictions. And respondent cannot contend that he was denied his right to counsel in the federal proceedings, because he was represented by appointed counsel at every critical stage. Thus, no proceeding exists in which a Sixth Amendment violation can plausibly be found.

3. The Ninth Circuit's rationales for finding a Sixth Amendment violation lack merit

The court of appeals observed that respondent's tribal-court convictions resulted in imprisonment and that respondent accordingly would have been entitled to appointed counsel had those prosecutions occurred in state or federal court. Pet. App. 8a. Relying heavily on the prior circuit decision in *United States* v. *Ant*, 882 F.2d 1389 (9th Cir. 1989), the court found it constitutionally impermissible to use the tribal-court convictions in a Section 117(a) prosecution because the tribal court had not "afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions." Pet. App. 16a. That analysis is erroneous.

a. The court of appeals believed the result in this case was dictated by *Ant*, which held that an uncounseled tribal-court guilty plea that resulted in imprisonment could not be used as evidence in a later federal prosecution for the same conduct, see 882 F.2d at 1394-1395. Pet. App. 12a-13a, 15a ("we are bound by *Ant*"); *id.* at 16a ("we reiterate *Ant*'s continued vitality"). But *Ant* relied in part on the then-extant holding in *Baldasar* that a valid, uncounseled misdemeanor conviction could not be used to support imprisonment in a subsequent proceeding. See *Ant*, 882 F.2d at 1394. Reasoning that it was necessary to "look[] beyond the validity of the tribal conviction," *Ant* concluded that the subsequent use of the conviction was impermissible: the defendant, *Ant* believed, was "in jeopardy of being imprisoned by a federal court because of a prior uncounseled guilty plea." *Id.* at 1394, 1396.

Ant was decided before the *Nichols* Court overruled *Baldasar*. And *Nichols* abrogated *Ant*'s rationale. Under *Nichols*, the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction. *Nichols* also reaffirmed the longstanding rule that the punishment meted out in a recidivist prosecution cannot be attributed to a prior conviction, such that the defendant is not being imprisoned "because of" the prior events. *Ant*, 882 F.2d at 1394. The court of appeals accordingly erred by "reiterat[ing] *Ant*'s continued vitality" and extending its holding to cover Section 117(a)'s predicate-offense element. Pet. App. 16a.[6]

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[6] *Ant* is distinguishable in any event because the government there sought to use the defendant's tribal-court guilty plea to

b. The court of appeals reasoned that the rule adopted in *Nichols* did not extend to this case because "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." Pet. App. 12a (citation omitted); see Br. in Opp. 14-15. But as Judge O'Scannlain observed in his dissent from the denial of rehearing en banc, "the court's argument is illogical" because "[b]oth Nichols's and [respondent's] uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." Pet. App. 50a.

The court of appeals identified no reason to distinguish prior uncounseled convictions that do not violate the Sixth Amendment because of the inapplicability of the Sixth Amendment to that jurisdiction from prior uncounseled convictions that do not violate the Sixth Amendment for other reasons—for example, because the defendant was not imprisoned, validly waived his right to counsel, was not indigent, or sustained the prior adjudication in a civil proceeding. Whether the

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establish his guilt of the same conduct in a federal prosecution. In contrast, the government in a Section 117(a) prosecution need only prove the fact of a defendant's prior tribal-court domestic violence convictions, without relitigating whether the underlying conduct occurred. The government must further independently establish that the defendant is guilty beyond a reasonable doubt of the separate, federally charged assaultive conduct. Unlike in *Ant*, it cannot rely on the prior tribal-court convictions as direct proof to carry that burden. Thus, even if *Ant* were still "good law," Pet. App. 13a, it would not control the constitutionality of Section 117(a).

conviction is valid because it was obtained in tribal court or because the Sixth Amendment did not apply on some other ground, its use will not exacerbate a prior constitutional violation. Nor would exclusion of the conviction prevent erosion of right-to-counsel principles, given that the defendant was not denied a right to counsel in the prior proceedings. The court of appeals' limitation on *Nichols* therefore has no basis in logic or in this Court's precedent.

c. Focusing on the sentences of imprisonment respondent received in tribal court, the court of appeals ruled that his Section 117(a) prosecution violated the Sixth Amendment because "even after *Nichols*, uncounseled convictions that resulted in imprisonment generally could not be used in subsequent prosecutions." Pet. App. 13a. But the court's premise that the validity of a misdemeanor *conviction* is tied to the sentence imposed is flawed. Even where it applies, the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but only any accompanying sentence of imprisonment. Thus, whether obtained in tribal, state, or federal court, an uncounseled misdemeanor conviction is constitutionally valid, both in its own right and for use in a subsequent proceeding, even if the sentence of imprisonment is not.

That conclusion follows from *Scott*, which made clear that the Sixth Amendment does not require appointment of counsel to adjudicate the *guilt* of an indigent misdemeanor defendant. 440 U.S. at 373-374. Rather, appointed counsel is required only if the defendant is *sentenced* to a term of imprisonment. See *id.* at 373 ("actual imprisonment [is] the line defining the constitutional right to appointment of counsel"). *Scott* does not license jurisdictions to dispense with

appointed counsel in all misdemeanor cases, and a jurisdiction may elect to preserve the possibility of a sentence of imprisonment by appointing counsel generally in misdemeanor cases. But because "the Sixth Amendment protects an uncounseled misdemeanor defendant not from a judgment of conviction but from the imposition" of imprisonment, the "appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself." *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); see *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."). Thus, even when a sentence of imprisonment violates the Sixth Amendment, a misdemeanor defendant's uncounseled conviction remains valid. See, *e.g.*, *United States* v. *Acuna-Reyna*, 677 F.3d 1282, 1284-1285 (11th Cir.), cert. denied, 133 S. Ct. 342 (2012); *United States* v. *Reilley*, 948 F.2d 648, 654 (10th Cir. 1991); *United States* v. *White*, 529 F.2d 1390, 1391, 1394 & n.4 (8th Cir. 1976); *Ex parte Shelton*, 851 So. 2d 96, 102 (Ala. 2000), aff'd, 535 U.S. 654 (2002); but see *United States* v. *Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (stating in dicta without analysis that "[i]f an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional").

Given the nature of the right to counsel in misdemeanor prosecutions, the Sixth Amendment should not preclude the use of an uncounseled conviction in a subsequent proceeding, even if the sentence in the prior proceeding was unconstitutional. See, *e.g.*, *Orte-*

ga, 94 F.3d at 769-770 (concluding that even if an uncounseled misdemeanant's sentence violated the Sixth Amendment, his conviction was "properly considered in his criminal history pursuant to *Nichols*"); accord *Acuna-Reyna*, 677 F.3d at 1284-1285; *United States* v. *Jackson*, 493 F.3d 1179, 1183-1184 (10th Cir. 2007); see also *Iowa* v. *Tovar*, 541 U.S. 77, 88 n.10 (2004) (acknowledging but reserving judgment on the issue). As Judge Owens observed, "[b]y holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the [court of appeals] split[] with every circuit to seriously consider this issue." Pet. App. 41a.

The Ninth Circuit's holding was therefore wrong even on its own (erroneous) reasoning that a court should look past the validity of the tribal convictions in tribal court. The court thought that respondent's "prior tribal court domestic abuse convictions would have violated the Sixth Amendment had they been obtained in state or federal court." Pet. App. 8a. But Section 117(a) is concerned with the fact of the tribal-court conviction, not the sentence respondent received, and his misdemeanor *convictions* would be valid in state and federal court, even if the accompanying sentences of imprisonment would not. The Sixth Amendment therefore should not preclude reliance on the convictions in a Section 117(a) prosecution.

4. Concerns about the reliability of uncounseled tribal-court convictions cannot create a Sixth Amendment violation where one did not previously exist

Although the court of appeals did not ground its decision in concerns about the reliability of uncoun-

seled tribal-court convictions, Judge Paez's concurrence in the denial of rehearing en banc suggested that the court's holding could be justified in light of "the Sixth Amendment's core interest in reliability." Pet. App. 36a. But the Sixth Amendment protects reliability interests by enumerating specific procedural safeguards. If a defendant cannot claim entitlement to one of those enumerated rights, as respondent cannot here, he cannot invoke the systemic interest in reliability as a basis to conclude that the Sixth Amendment was violated. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (observing that the Sixth Amendment "commands, not that a trial be fair, but that * * * particular guarantee[s] of fairness be provided").[7]

a. This Court's precedents foreclose the argument that the Sixth Amendment prohibits reliance on valid, uncounseled convictions because of reliability concerns. The Court has correctly emphasized that the right to appointed counsel enhances the fairness and accuracy of state and federal criminal proceedings. See, *e.g.*, *Johnson*, 304 U.S. at 463; *Gideon*, 372 U.S. at 344; *Shelton*, 535 U.S. at 667. But the decisions in *Scott* and *Nichols* establish that a reliable and valid determination of guilt can be obtained in misdemeanor proceedings even without appointed counsel. As noted above, *Scott* upheld the constitutional validity of an uncounseled misdemeanor conviction in state or federal court that resulted only in a fine. The *Scott* Court thus necessarily recognized that such convictions are

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[7] To the extent that Judge Paez's concerns invoke due process principles, Congress's decision to permit reliance on uncounseled tribal-court convictions in a Section 117(a) prosecution does not offend due process. See pp. 41-58, *infra*.

sufficiently reliable to establish guilt beyond a reasonable doubt, to support imposition of a criminal fine, and to subject the defendant to the stigma and collateral civil consequences that accompany a criminal conviction.

Nichols further underscores the point by permitting reliance on valid, uncounseled convictions to establish a defendant's status as a recidivist in a subsequent prosecution. The Court in *Nichols* recognized the argument—pressed by three Justices in *Baldasar* and the dissenting opinion in *Nichols* itself—that "an uncounseled misdemeanor conviction is 'not sufficiently reliable' to support imprisonment" and "'does not become more reliable merely because the accused has been validly convicted of a subsequent offense.'" 511 U.S. at 744 (quoting *Baldasar*, 446 U.S. at 227-228 (Marshall, J., concurring)); *id.* at 757-758 (Blackmun, J., dissenting) (expressing the view that "prior uncounseled misdemeanor conviction[s]" are not "sufficiently reliable to justify additional jail time imposed under an enhancement statute"). But the Court in *Nichols* was not persuaded by that argument. Instead, it overruled *Baldasar* and permitted an uncounseled misdemeanor conviction that itself could not have supported imprisonment to trigger a sentencing enhancement that did. The Court thus necessarily rejected the notion that prior uncounseled misdemeanor convictions are categorically unreliable so as to violate the Constitution when used to support imprisonment in a later proceeding.[8]

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[8] Notably, a contrary view would call into question the use of *any* uncounseled conviction in a subsequent proceeding, without regard to whether the absence of counsel violated the defendant's Sixth Amendment rights. A defendant who validly waived his right to

Judge Paez sought to distinguish *Nichols* on the ground that it was "a sentencing case," whereas Section 117(a) makes prior convictions an element of the offense. Pet. App. 35a. In Judge Paez's view, "[t]he Court in *Nichols* acknowledged the reliability concerns that inhere in the Sixth Amendment right to counsel" and "affirmed the sentencing court's assessment of criminal history points under the United States Sentencing Guidelines" only "because the sentencing court used the predicate uncounseled conviction during the sentencing phase, rather than the guilt phase." *Id.* at 36a; see Br. in Opp. 15.

Nichols did observe that the rule it adopted was "consistent with the traditional understanding of the sentencing process, which [the Court] ha[d] often recognized as less exacting than the process of establishing guilt." 511 U.S. at 747. But *Nichols* did not limit its ruling to sentencing systems like the Guidelines. To the contrary, the Court acknowledged that "[e]nhancement statutes" may take the form of "criminal history provisions such as those contained in the Sentencing Guidelines, *or* recidivist statutes that are commonplace in state criminal laws." *Ibid.* (emphasis added). Whether the defendant is charged in the indictment pursuant to a recidivist statute (as in *Baldasar*) or subjected to recidivist punishment under sentencing guidelines (as in *Nichols*), the prior convictions "do not change the penalty imposed for the earlier conviction." *Ibid.* Thus, under *Nichols*, reliance

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counsel, for example, or a defendant who could have afforded counsel, could later claim that his uncounseled conviction is categorically unreliable and so cannot be used to classify him as a recidivist in a subsequent prosecution. The Sixth Amendment does not require such an extreme result.

on prior convictions cannot create a Sixth Amendment violation where one did not previously exist—and that remains true whether the convictions serve as an element of a later offense or a sentencing factor warranting enhanced punishment. That principle explains why *Nichols* did not distinguish *Baldasar*, but rather overruled it. See *id.* at 748.[9]

Nor does logic support limiting *Nichols* to the sentencing context. Whether a prior conviction is introduced during the guilt phase to satisfy an element or the punishment phase to enhance a sentence, the substantive use of the conviction is the same: to establish that the defendant is a repeat offender. Although the government must prove the fact of the prior conviction beyond a reasonable doubt in a Section 117(a) prosecution, whereas it had to prove the fact of the prior conviction only by a preponderance of the evidence in *Nichols*, the standard of proof to establish the fact of conviction does not entail any inquiry into the reliability of that conviction. What counts in ei-

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[9] In an opinion concurring in the judgment in *Nichols*, Justice Souter distinguished between automatic enhancements based on recidivist status and presumptive enhancements that may be rebutted by "convinc[ing] the sentencing court of the unreliability of any prior valid but uncounseled convictions." 511 U.S. at 752. Judge Paez relied on that distinction to suggest that *Nichols* should not apply outside a sentencing context in which the defendant has an opportunity to challenge the reliability of the prior conviction. Pet. App. 36a. But the majority in *Nichols* rejected such a limitation on the rule it had announced. The statute in *Baldasar* provided for "automatic enhancement based on prior uncounseled convictions," 511 U.S. at 751 (Souter, J., concurring in the judgment), and the *Nichols* majority nevertheless expressly overruled *Baldasar*'s holding that such a statute is unconstitutional. *Id.* at 748.

ther setting is the fact that the defendant was previously convicted. Any attempt to limit *Nichols* to the sentencing context accordingly fails.

b. A Sixth Amendment holding that a tribal-court misdemeanor conviction is deemed unreliable if the tribal court imposed a sentence of imprisonment, but not if the court imposed a lesser sentence such as a fine, would also yield insupportable and incongruous results. The Ninth Circuit's reasoning would permit a fine-only tribal-court conviction to serve as a predicate offense in a Section 117(a) prosecution because the defendant would not have had a right to appointed counsel had he been prosecuted in state or federal court. See Pet. App. 16a (holding that "the [Section] 117(a) charges against [respondent] must be dismissed because at least one of his predicate tribal court domestic abuse convictions was uncounseled *and resulted in a term of imprisonment*") (emphasis added). But the sentence imposed in tribal court has no bearing on the reliability of the underlying adjudication of guilt. From the standpoint of reliability, therefore, it would be illogical to permit prosecution under Section 117(a) when a defendant did not receive prison sentences for his prior uncounseled domestic-violence tribal-court convictions, while foreclosing prosecution of defendants who did receive such sentences, *i.e.*, those defendants who likely committed more serious crimes or who were repeat offenders. This Court should decline to interpret the Sixth Amendment to require such a counterintuitive result.

B. Due Process Principles Do Not Preclude Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions To Prove Section 117(a)'s Predicate-Offense Element

In addition to challenging Section 117(a) on Sixth Amendment grounds, respondent argued in the district court that the statute violates due process as applied to uncounseled tribal-court misdemeanor convictions. See C.A. E.R. 34; see also *Shavanaux*, 647 F.3d at 998-1001 (considering and rejecting due process challenge to Section 117(a)). That argument lacks merit. Congress's decision to permit reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element satisfies due process if it is "rational[]," *Lewis* v. *United States*, 445 U.S. 55, 66 (1980), and Section 117(a) readily passes that test.

1. Congress's decision to permit uncounseled tribal-court convictions to serve as predicate offenses for a Section 117(a) prosecution is tested for rationality

a. Congress has broad authority to define the elements of criminal offenses, *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), and to make the fact of a prior conviction an element, *e.g.*, *Lewis*, 445 U.S. at 66. When Congress elects to use the fact of a defendant's prior conviction to partially define an offense, or to define the punishment for an offense, the Constitution does not require the government to independently prove the defendant's guilt of the underlying prior offense in the subsequent prosecution. Instead, when a prior conviction is made an element, the government need only prove the fact of that conviction.

b. In this case, Congress unequivocally made tribal-court convictions predicate offenses for a Section 117(a) crime, whether or not the defendant had counsel. Section 117(a) expressly states that prior convictions in "Indian tribal court proceedings" satisfy the statute's predicate-offense element. 18 U.S.C. 117(a) (Supp. II 2014). The statute provides no avenue for excluding convictions because of the lack of counsel. Cf. *Lewis*, 445 U.S. at 62, 65 (finding no right to collaterally challenge a predicate felony in a felon-in-possession prosecution on grounds that the defendant was denied counsel in the prior proceeding, and contrasting the felon-in-possession statute with other "federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony"). And Congress is presumed to be aware that tribal-court convictions frequently are uncounseled, given that the Sixth Amendment does not apply to tribal courts and ICRA does not require appointed counsel in tribal misdemeanor prosecutions. See, *e.g.*, *Mississippi* v. *AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (reiterating the maxim that courts "presume that 'Congress is aware of existing law when it passes legislation'") (quoting *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012)).

c. Whether viewed as a question of substantive due process or analyzed through the lens of equal protection, Congress's decision to make tribal-court convictions predicate offenses for a Section 117(a) prosecution is subject to rational-basis review. See *Lewis*, 445 U.S. at 65; *Washington* v. *Glucksberg*, 521 U.S. 702, 722, 728 (1997). As this Court explained in *Lewis*, Congress's election to define a crime in part by refer-

ence to a prior conviction is permissible under due process principles "if there is some rational basis for the statutory distinctions made . . . or . . . they have some relevance to the purpose for which the classification is made." 445 U.S. at 65 (citation and internal quotation marks omitted). Congress's focus on an individual's status as a convicted domestic-violence offender is not "based upon constitutionally suspect criteria," and the prohibition on further acts of violence does not "trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Congress's judgment that Section 117(a) should cover any individual who commits an act of domestic violence in Indian country and who has at least two prior tribal-court convictions for domestic violence, whether counseled or not, must accordingly be upheld unless that judgment "cannot rationally be supported * * * with the deference that a reviewing court should give to a legislative determination that, in essence, predicts a potential for future criminal behavior." *Id.* at 67 n.9.

2. Congress could rationally conclude that permitting uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element was essential to the effort to combat domestic violence in Indian country

Congress enacted Section 117(a) in response to an epidemic of domestic violence in Indian country and a jurisdictional void that permitted offenders to perpetuate cycles of abuse. Against that backdrop, Congress rationally—and constitutionally—concluded that federal felony prosecution was warranted for any domestic-assault offender whose prior tribal-court convictions did not deter him from future acts of violence.

a. Section 117(a) was enacted to address the "grave problem of domestic violence on tribal lands." Pet. App. 40a (Owens, J., dissenting from the denial of rehearing en banc); see Br. in Opp. 28 (acknowledging that Section 117(a) "was developed to combat a serious problem with domestic violence in tribal communities"). "American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women." Cert. Amicus Br. of Nat'l Congress of Am. Indians 2; see *id.* at 4-8 (summarizing statistics). More than 45% of Indians have been victims of physical violence, rape, or stalking by an intimate partner in their lifetimes. See Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3, 39-40 & tbls. 4.3 & 4.4 (Nov. 2011).[10] In legislative findings accompanying Section 117(a), Congress found, *inter alia*, that "during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances." VAWA Reauthorization Act § 901(4), 119 Stat. 3077-3078.

Recidivist abusers, moreover, are especially dangerous, because "[d]omestic violence often escalates in severity over time." *United States* v. *Castleman*, 134 S. Ct. 1405, 1408 (2014). A study by the National Institute of Justice found, for example, that women who were physically assaulted by an intimate partner averaged nearly seven physical assaults by the same partner. See Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Ex-*

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[10] http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

tent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey, at iv (July 2000);[11] see also, *e.g.*, *United States* v. *Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (collecting studies and observing that "[n]o matter how you slice the[] numbers, people convicted of domestic violence remain dangerous to their spouses and partners"), cert. denied, 562 U.S. 1303 (2011).

When Congress enacted Section 117(a), it was aware that Indian offenders who committed repeated acts of domestic violence against other Indians in Indian country frequently escaped felony-level punishment. ICRA at that time precluded the tribes themselves from imposing terms of imprisonment greater than one year. See 25 U.S.C. 1302(7) (2006).[12] The federal government generally could not prosecute such Indian offenders unless their violence caused death or serious bodily injury. See 18 U.S.C. 1153 (Indian Major Crimes Act); see also 18 U.S.C. 1152 (Indian Country Crimes Act) (excluding "offenses committed by one Indian against the person or property of another Indian" from coverage under Section 1152). And although some States have criminal jurisdiction over crimes involving Indians in Indian coun-

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[11] https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[12] More than four years after Section 117(a) was enacted, Congress amended ICRA to authorize tribal courts to impose sentences of up to three years of imprisonment for a single offense, provided the courts comply with additional procedural requirements. 25 U.S.C. 1302(b) and (c). As of August 2015, only ten tribal courts were relying on that enhanced sentencing authority. See Tribal Law & Policy Inst., *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.

try, most do not.[13] See *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-474 (1979); 18 U.S.C. 1162; see also Tribal Law & Policy Inst., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7-8 (Dec. 2007) (noting that the States that do have jurisdiction often face funding constraints that substantially limit their efforts to combat crime in Indian country).[14]

Section 117(a) was intended to close that gap by giving "federal prosecutors the ability to intervene in the cycle of violence." See 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain introducing bill containing precursor to Section 117(a)). And inclusion of tribal-court domestic-violence convictions as predicate offenses was essential to accomplishing that goal because many habitual tribal offenders will not have convictions in any other jurisdiction. See *ibid.* (observing that perpetrators of domestic violence in Indian country "may escape felony charges until they seriously injure or kill someone" and that Section 117(a) addresses that problem by "creat[ing] a new Federal offense aimed at the habitual domestic violence offender and allow[ing] tribal court convictions to count for purposes of Federal felony prosecution").

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[13] Public Law 280 granted a number of States the authority to exercise general criminal jurisdiction over Indians in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588; 18 U.S.C. 1162; 28 U.S.C. 1360; see also 25 U.S.C. 1321 (procedure for additional States to assume jurisdiction); *Duro*, 495 U.S. at 680 n.1 (noting "complex patchwork" of criminal jurisdiction in Indian country).

[14] http://www.ncdsv.org/images/TLPI_FocusGroupPublicLaw280SexualAssaultNativeWomen_FinalReport_12-31-07.pdf.

In short, as the legislative findings recount, "the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women," and Section 117(a) aims to help fulfill that responsibility by "decreas[ing] the incidence of violent crimes against Indian women." VAWA Reauthorization Act §§ 901(6), 902(1), 119 Stat. 3078.

b. In light of its broad purpose to combat domestic violence in Indian country, Congress could rationally choose to make uncounseled tribal-court convictions predicate offenses under Section 117(a). Congress could rationally determine that offenders who have sustained multiple tribal domestic-abuse convictions, yet have not been deterred from committing that crime, pose a heightened danger to the security of persons in Indian country. Cf. *Lewis*, 445 U.S. at 67 (upholding the rationality of Congress's focus "on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons"). The rationality of this approach is underscored by considering other options available to Congress. Congress could have created a new federal crime for any act of domestic violence in Indian country—but such a statute would fail to differentiate between more and less dangerous offenders and would vastly expand federal jurisdiction on tribal lands. Or Congress could have targeted only habitual offenders with counseled prior convictions—but such a statute would be ineffective in addressing domestic violence in Indian country because it would exclude many offenders with tribal-court misdemeanor convictions, for which no statutory or constitutional right to appointed counsel exists in the tribal proceedings. Faced with those

options, Congress reasonably chose to rely on the fact of prior domestic-violence convictions—whether counseled or not, and whether the convictions resulted in imprisonment or not—as a means of identifying the class of offenders who are most likely to perpetuate the epidemic of domestic abuse in Indian country.

Congress had sound reasons, worthy of judicial deference, see *Lewis*, 445 U.S. at 67 n.9, to determine that an individual who has twice been formally found by a tribal community to have engaged in domestic violence and who nevertheless commits another domestic-violence offense in Indian country should be exposed to federal felony prosecution and punishment. For that class of offenders, tribal remedies have proved inadequate. And even if the prior tribal convictions were uncounseled, Congress could rationally believe that the individual is "potentially dangerous" and should be subject to prosecution under Section 117(a) if he commits additional violence. *Id.* at 67. That result aids Congress's broad purpose to combat domestic violence in Indian country, both by deterring abuse through the prospect of federal prosecution and by incapacitating offenders who nonetheless commit criminal acts of abuse.

3. Congress could rationally conclude that uncounseled tribal-court misdemeanor convictions are sufficiently reliable to serve as predicate offenses for a Section 117(a) prosecution

Respondent asserts (Br. in Opp. 22) that "Congress could not rationally conclude that uncounseled convictions used in a subsequent federal prosecution as evidence of guilt [a]re reliable." That claim lacks merit.

a. At the outset, this Court's determination in *Scott* and *Nichols* that uncounseled convictions are not categorically unreliable demonstrates that Congress acted rationally in permitting reliance on uncounseled tribal-court convictions to satisfy Section 117(a)'s predicate-offense element. If uncounseled convictions in state and federal misdemeanor prosecutions are sufficiently reliable to support a finding of guilt and the imposition of a fine, and to subject the defendant to the various collateral consequences of such a conviction—including classification as a recidivist in a subsequent proceeding—then Congress could rationally conclude that uncounseled misdemeanor tribal-court convictions are likewise sufficiently reliable determinations of guilt to warrant exposure to punishment as a habitual offender under Section 117(a). See *Baldasar*, 446 U.S. at 234 n.2 (observing that an "uncounseled conviction * * * conceded to be valid * * * must be presumed reliable") (Powell, J., dissenting).[15]

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[15] Congress's judgment is bolstered by its decision to include within Section 117(a) only individuals who have been convicted on two prior occasions of the very same type of crime. The similarity between the charged and predicate domestic-violence offenses not only indicates an offender's "potential for future criminal behavior," *Lewis*, 445 U.S. at 67 n.9, but also supports the congressional judgment that the prior convictions, even if uncounseled, are fair indicators of his abusive past. Cf. *United States* v. *Drain*, 740 F.3d 426, 432 (7th Cir. 2014) (explaining that although "an arrest alone does not necessarily mean guilt," a "substantial history of arrests, especially if they are similar to the offense of conviction, can be a reliable indicator of a pattern of criminality"); *United States* v. *Port*, 532 F.3d 753, 755 (8th Cir. 2008) (approving district court's consideration of foreign convictions at sentencing because they "demonstrate[d] a clear risk of recidivism given the close relationship between [the defendant's] present offense and his prior of-

b. Moreover, when Congress enacted Section 117(a), it was aware that tribal-court defendants are entitled to an array of procedural protections pursuant to ICRA. Congress could reasonably have concluded that those statutory protections, as well as the right to federal habeas corpus review, sufficiently assure the reliability of tribal-court adjudications of guilt in misdemeanor cases.

A "central purpose" of ICRA was "to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978) (brackets in original) (quoting S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967)). To that end, ICRA guarantees that a tribal-court defendant will not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(a)(8). A defendant accused of an offense punishable by imprisonment has the right to a jury trial, and ICRA further grants a defendant "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. 1302(a)(6) and (10). ICRA also protects against compelled self-incrimination, unreasonable searches and seizures, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2)-(4) and (7). In addition, tribal-court defendants are entitled to seek habe-

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fenses and given [the defendant's] failure to cease [the criminal conduct] even after his incarcerations for similar offenses").

as corpus review of their convictions in federal court. 25 U.S.C. 1303.

ICRA's right-to-counsel provision does diverge from the Sixth Amendment, but that reflects Congress's judgment that a defendant may be convicted of a misdemeanor through fundamentally fair tribal-court procedures even in the absence of counsel. Notably, Congress has revisited ICRA on several occasions and has given renewed consideration to the right to counsel in tribal-court proceedings, but it has continued to decline to require a right to appointed counsel in misdemeanor proceedings. When ICRA was first enacted, tribal courts could not sentence criminal defendants to more than six months of imprisonment and a fine of $500 for one offense. See 25 U.S.C. 1302(7) (1970). In 1986, Congress increased those limits to one year of imprisonment and a $5000 fine, but made no changes to ICRA's right-to-counsel provision. See 25 U.S.C. 1302(7) (Supp. IV 1986). In 2010, Congress further revised the limits upward, authorizing tribal courts to impose a prison term of up to three years and a fine of up to $15,000 for a single offense. 25 U.S.C. 1302(a)(7)(C) (Supp. IV 2010); see Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Tit. II, 124 Stat. 2261. Congress provided, however, that tribes may sentence defendants to terms of imprisonment exceeding one year only if the tribes comply with additional procedural protections, including appointing counsel for indigent defendants. 25 U.S.C. 1302(c)(2). Thus, Congress has been attuned to right-to-counsel issues in tribal proceedings and has consistently determined that appointed counsel is not necessary to safeguard the fairness of tribal-court misdemeanor prosecutions. See *Santa Clara Pueblo*,

436 U.S. at 62-63 (observing that Congress in ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). That legislative judgment warrants respect.

c. Principles of comity fortify Congress's judgment to include tribal-court convictions as predicate offenses under Section 117(a). Tribal prosecutions reflect the tribe's inherent retained sovereignty, *United States* v. *Wheeler*, 435 U.S. 313, 329 (1978); *United States* v. *Lara*, 541 U.S. 193, 210 (2004), and a tribe's valid judgment of conviction merits at least the same respect as a judgment rendered by a foreign tribunal. See, *e.g.*, *Shavanaux*, 647 F.3d at 998 (emphasizing that courts have "analogized Indian tribes to foreign states" for purposes of determining whether to recognize tribal-court judgments); *State* v. *Spotted Eagle*, 71 P.3d 1239, 1245 (Mont.) (observing that tribal-court judgments should be treated "with the same deference as those of foreign sovereigns as a matter of comity"), cert. denied, 540 U.S. 1008 (2003); see also *Cohen's Handbook of Federal Indian Law* § 7.07[2][b], at 664 (Nell Jessup Newton et al. eds., 2012) (noting that all States that have addressed the issue grant either full faith and credit or at least some form of comity to tribal-court judgments).

This Court has previously held that federal courts may give effect to foreign judgments secured in "proceedings * * * according to the course of a civilized jurisprudence." *Hilton* v. *Guyot*, 159 U.S. 113, 205 (1895); see *id.* at 202 (comity is warranted when, *inter alia*, "there has been opportunity for a full and fair trial * * * under a system of jurisprudence likely to secure an impartial administration of justice"). A

foreign tribunal need not offer procedural protections identical to those contained in the U.S. Constitution; rather, reliance on foreign convictions is permissible so long as the convictions were obtained under a foreign legal system that is not fundamentally unfair. See, *e.g.*, 1 Restatement (Third) of Foreign Relations § 482(1)(a), at 604 (1987) (providing that U.S. courts need not recognize a foreign judgment if it "was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law").[16]

It is eminently reasonable for Congress to conclude that tribal-court proceedings conducted in conformance with ICRA—which notably guarantees defend-

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[16] Notably, federal courts have in some instances relied upon foreign convictions obtained without the assistance of counsel. See *Houle* v. *United States*, 493 F.2d 915, 916 n.2 (5th Cir. 1974) (per curiam) (holding that trial court did not err in increasing the defendant's sentence based on an uncounseled Canadian conviction, and declining to assume that the rationale for requiring appointed counsel in *Gideon* "may be the basis for a judgment that a foreign system, utilizing procedures with which we are unfamiliar, has failed to provide a fair trial if it does not conform with our right-to-counsel concepts"); see also *United States* v. *Concha*, 294 F.3d 1248, 1254 (10th Cir. 2002) (holding that the defendant's "foreign convictions * * * may be considered [at sentencing for a subsequent offense] notwithstanding the possibility that they were obtained without the assistance of counsel"), cert. denied, 537 U.S. 1145 (2003); *United States* v. *Fleishman*, 684 F.2d 1329, 1346 (9th Cir.) (holding that the district court committed no constitutional error in considering uncounseled Mexican convictions to enhance the defendants' sentences for a subsequent offense on the ground that the defendants "had been involved in drug-related offenses [in Mexico] and had not learned from their experiences"), cert. denied, 459 U.S. 1044 (1982), abrogated in part on other grounds by *United States* v. *Ibarra-Alcarez*, 830 F.2d 968 (9th Cir. 1987).

ants due process of law, see 25 U.S.C. 1302(a)(8)—are fundamentally fair, even though ICRA does not provide a right to appointed counsel in misdemeanor prosecutions that result in imprisonment. See *Shavanaux*, 647 F.3d at 1000 ("We hold that tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law."); Pet. App. 20a (Watford, J., concurring) (emphasizing that "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that "if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts' respect").

In recognition of the fact that tribal courts may fairly and reliably dispense justice, legislatures and courts have given effect to tribal-court judgments in a variety of circumstances. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 435-439 (2004) (observing that tribal-court convictions have been relied upon to, *inter alia*, grant upward departures at sentencing in federal prosecutions for subsequent offenses; transfer a juvenile offender to adult status; enhance charges for state prosecutions for driving under the influence of alcohol; serve as a predicate for suspension of a driver's license; find probation violations; and require registration in sex offender databases). Principles of comity thus further demonstrate that Congress acted rationally in determining that valid tribal-court judgments are sufficiently reliable to serve as predicate offenses in a Section 117(a) prosecution.

4. The facts of this case demonstrate that uncounseled tribal-court misdemeanor convictions are not categorically unreliable

Although respondent asserts (Br. in Opp. 15) that uncounseled tribal-court convictions are "categorically unreliable," the facts of his case prove him wrong. Respondent has never suggested in this litigation that he did not actually commit the acts of domestic violence underlying his multiple tribal-court convictions for domestic assault, or that due process entitles him to collaterally challenge those convictions on grounds of actual innocence in his Section 117(a) prosecution. And for good reason: the record in this case leaves no doubt concerning respondent's status as a recidivist domestic-violence offender. As the PSR summarizes, respondent pleaded guilty in tribal court on at least five occasions to committing domestic assault. See PSR ¶ 81; cf. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (observing that when a defendant pleads guilty, "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised") (citation omitted). Respondent raised no objection to the PSR's summary of the facts resulting in his tribal-court convictions, and he confirmed at sentencing that the district court "c[ould] rely upon the accuracy of the report." J.A. 41. Indeed, respondent has conceded that his prior convictions are reliable enough to permit his prosecution as a repeat offender in tribal court. Br. in Opp. 11.

The facts underlying respondent's convictions paint a devastating picture of domestic abuse. Respondent attempted to strangle one girlfriend and hit her on the head with a beer bottle. PSR ¶ 81. He kneed another

girlfriend and broke her nose. *Ibid.* As Judge Owens summarized:

> [Respondent] likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out.

Pet. App. 40a. Respondent's many convictions, moreover, do not even capture the full extent of his record of domestic violence. In connection with his federal prosecution, respondent admitted that he had assaulted the victims of his most recent attacks on multiple occasions. See PSR ¶¶ 33, 35. That admission ultimately warranted a sentence enhancement pursuant to Sentencing Guidelines § 2A6.2(b)(1) (2010) for engaging in "a pattern of activity involving * * * assaulting the same victim." See PSR ¶¶ 52, 58; J.A. 42 (noting that respondent "admitted that [he] got physical with" one victim "between five and six times," in addition to the charged offense).

In short, respondent is precisely the kind of habitual offender Congress sought to include within Section 117(a). He repeatedly assaulted his intimate partners on the Northern Cheyenne Indian Reservation, but he received only misdemeanor-level punishment again and again. See Pet. App. 40a (Owens, J., dissenting from the denial of rehearing en banc) ("Although [respondent's] violence varies, his punishment never does. Despite [respondent's] brutality * * * his worst sentence was a slap on the wrist"). And that punishment did not deter him from committing yet additional acts of violence within his tribal community.

Respondent's speculation about potential unfairness in tribal-court proceedings provides no basis for categorically foreclosing a Section 117(a) prosecution based on uncounseled convictions. As this case demonstrates, tribal-court convictions, even if uncounseled, may be entered fairly, form reliable records of guilt, and attest to the pressing need for federal intervention to deter and punish domestic violence in Indian country.

Although respondent does not maintain that he was wrongfully convicted in tribal court, he asserts (Br. in Opp. 13) that uncounseled tribal-court defendants may not "appreciat[e] the penalties and disabilities their uncounseled convictions will subject them to." But the same argument was made and rejected in *Nichols*, which declined to find that "due process requires a[n] [uncounseled] misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime." 511 U.S. at 748. The *Nichols* Court reasoned that a warning that the defendant "will be treated more harshly" if "he is brought back into court on another criminal charge * * * would merely tell him what he must surely already know." *Ibid.*; see also note 4, *supra* (noting the escalating recidivist penalties that respondent faced in tribal court). Respondent's knowledge that he had multiple domestic-violence convictions in tribal court should have "serve[d] as an incentive not to commit a subsequent crime and risk" being classified as a recidivist. *Daniels* v. *United States*, 532 U.S. 374, 381 n.1 (2001). Because respondent instead chose to continue assaulting his domestic partners, he should not be heard to

complain that his actions exposed him to prosecution under Section 117(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2016

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. 18 U.S.C. 117 (2006) provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim share a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

4. 18 U.S.C. 117 (Supp. II 2014) provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

5. 25 U.S.C. 1302 (2006) provides:

Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his

favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and[1] a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

6. 25 U.S.C. 1302 provides:

Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom

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[1] So in original. Probably should be "or".

of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty

or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot

program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

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[1] See References in Text note below.

7. 25 U.S.C. 1303 provides:

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

8. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901 and 902, 119 Stat. 3077-3078 provides:

SEC. 901. FINDINGS.

Congress finds that—

(1) 1 out of every 3 Indian (including Alaska Native) women are raped in their lifetimes;

(2) Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women;

(3) Indian women experience the violent crime of battering at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women;

(4) during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances;

(5) Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and

(6) the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.

SEC. 902. PURPOSES.

The purposes of this title are—

(1) to decrease the incidence of violent crimes against Indian women;

(2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and

(3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.

No. 15-420

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

WHETHER RELIANCE ON UNCOUNSELED TRIBAL COURT MISDEMEANOR CONVICTIONS TO PROVE THE PREDICATE OFFENSE ELEMENT OF 18 U.S.C. §117 VIOLATES THE UNITED STATES CONSTITUTION.

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OPINIONS BELOW

The opinion of the Ninth Circuit is published and reported at 769 F.3d 671 (9th Cir. 2014). A copy of that opinion is set forth in the Government's appendix to its petition for a writ of certiorari (Pet'r App. 1a-21a). The order of the Ninth Circuit denying the Government's petition for rehearing en banc is published and reported at 792 F.3d 1042 (9th Cir. 2015). A copy of that order is also set forth in the Government's appendix to its petition for a writ of certiorari (Pet'r App. 33a-54a). The oral ruling of the district court denying Mr. Bryant's motion to dismiss the Indictment is unreported. *See* Pet'r App. 22a-32a.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 30, 2014. The petition for a writ of certiorari was filed on October 5, 2015 and was granted on December 14, 2015. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. V

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI

STATUTORY AND/OR FEDERAL RULE INVOLVED

18 U.S.C. §117. Domestic assault by an habitual offender

(a) **In general.** Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction –

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

STATEMENT

As a Native American from the Northern Cheyenne Reservation, Mr. Bryant has never disputed he has prior misdemeanor domestic violence convictions from the Northern Cheyenne Tribal Court. Instead, Mr. Bryant has always disputed the use of those tribal court convictions by the Government in a federal prosecution when those tribal court convictions are used as an element of the federal prosecution and those tribal court convictions are obtained without providing Mr. Bryant one of the core protections United States citizens hold as fundamental to our criminal justice system – the right to counsel. The Ninth Circuit held "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014).

Present Controversy

1. Mr. Bryant was indicted in the United States District Court for the District of Montana, Billings,

Montana, under 18 U.S.C. §117(a) with two counts of felony domestic assault by an habitual offender. J.A. 13, Docket No. 9. Prosecution under §117(a) requires a person to have "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate partner." 18 U.S.C. §117(a)(1) (2006).

2. Mr. Bryant moved to dismiss the Indictment against him, arguing it violated his Fifth and Sixth Amendment rights to the United States Constitution for the Government to rely on uncounseled tribal convictions as an element for prosecution under 18 U.S.C. §117. J.A. 113-114, Docket Nos. 19-20. The district court denied the motion. J.A. 14-15, Docket No. 25. Mr. Bryant ultimately entered into a plea agreement, reserving his right to appeal the pretrial denial of his motion to dismiss. J.A. 27-36. He was sentenced to 46 months imprisonment followed by three years supervised release. J.A. 17-18, Docket No. 33.

3. Mr. Bryant appealed to the Ninth Circuit and a three-Judge Panel analyzing the issue under the Sixth Amendment reversed. *Bryant*, 769 F.3d at 679. Noteworthy at the Ninth Circuit, the Government conceded Mr. Bryant was imprisoned on more than one occasion for his domestic violence tribal court convictions. J.A. 49-50. Mr. Bryant's indigent status thereby has never been questioned nor has his inability to

obtain counsel when he pled guilty in tribal court. *See* Pet'r Br. 7; *Bryant*, 769 F.3d at 673.

4. Mr. Bryant has never contended his tribal court convictions themselves were unconstitutional or in violation of ICRA. *Bryant*, 769 F.3d at 675. Rather, he has consistently argued it violated the Constitution to use the tribal court convictions in federal court to prove an element of the federal prosecution. *Id.*

5. The Ninth Circuit agreed with that argument. The Ninth Circuit held that tribal court convictions in which a defendant was subjected to imprisonment may be used to prove an element in federal court only when he was given counsel. *Bryant*, 769 F.3d at 677. Otherwise as for Mr. Bryant, use of tribal court convictions to establish an element of an offense in a subsequent prosecution is constitutionally impermissible. *Id.*

6. Judge Watford concurred with the *Bryant* decision but believed this Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), called the Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), into question. *Bryant*, 769 F.3d at 679. Judge Watford posited *Nichols* undercut the proposition that uncounseled convictions were categorically unreliable. As such, the seemingly contrary holding in *Ant* was difficult to "square with" the notion Mr. Bryant's prior convictions were not obtained in violation of the Sixth Amendment since they occurred in tribal court. *Id.*

7. Relying largely on Judge Watford's concurrence, the Government filed a petition for rehearing en banc in the Ninth Circuit. J.A. 8, 10, Docket Nos. 56, 62. The Ninth Circuit denied the petition. *United States v. Bryant*, 792 F.3d 1042 (9th Cir. 2015).

SUMMARY OF THE ARGUMENT

The use of prior convictions to meet the predicate offense element of §117 violates the Sixth Amendment if the defendant was not afforded the right to counsel during the proceedings that resulted in the prior convictions. This Court has long held reliability is a core concern of the Sixth Amendment right to counsel and convictions obtained without the guiding hand of counsel are insufficiently reliable for a felony conviction or for a sentence that involves the loss of liberty. *See e.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Burgett v. Texas*, 389 U.S. 109 (1967).

These Sixth Amendment principles apply here, where Mr. Bryant's uncounseled tribal court convictions are used to establish an element of the Government's §117 prosecution. Although the prior uncounseled tribal court convictions were not themselves unconstitutional because the Constitution does not apply to tribal courts, the Sixth Amendment was violated when these uncounseled convictions were used to establish an element of a felony offense in federal court. Mr. Bryant was deprived of counsel

when he was convicted and sentenced in tribal court, and he was unable to challenge those convictions when he did have counsel in the instant federal court proceeding. He thus faced incarceration based in part on convictions that were uncounseled, in violation of the principles set out in *Burgett* and its progeny. *See Alabama v. Shelton*, 535 U.S. 654 (2002).

This Court's holdings in *Lewis v. United States*, 445 U.S. 55 (1980), and *Nichols v. United States*, 511 U.S. 738 (1994), do not alter the fact a prior conviction turns on whether a defendant had counsel in the prior proceeding. The focus of the Government's prosecution of the defendant in *Lewis* was not on the prior conviction as an element of the offense – as it is in Mr. Bryant's case – nor did *Lewis* overrule *Burgett*. A prior conviction obtained in violation of the Sixth Amendment cannot be used to support guilt in a subsequent offense. Even *Nichols* underscores that for a prior conviction to be used in a sentencing context, a prior conviction must comport with *Scott v. Illinois*, 440 U.S. 367 (1979).

The Government's Due Process challenge is not a separate substantive or procedural due process challenge, nor is it properly preserved. The first time Due Process became a stand-alone issue was in the Government's petition for a writ of certiorari. The Ninth Circuit decided Mr. Bryant's case based on a Sixth Amendment analysis and the Government's petition for rehearing en banc was denied on the same basis. Additionally, the Government now makes an argument for the first time that Mr. Bryant's prior tribal

court convictions are not categorically unreliable, which is not an issue embraced by the Question Presented before this Court. Should this Court, however, reach the Due Process argument, §117 does not comport with Due Process because the use of uncounseled convictions to establish an element dilutes the fundamental constitutional requirement of proof beyond a reasonable doubt.

Consequently, this Court should affirm the Ninth Circuit's decision, holding Mr. Bryant's tribal court convictions may be used in a subsequent §117 prosecution only where those convictions also comported with the Sixth Amendment per *Scott*.

ARGUMENT

I. PRIOR TRIBAL COURT CONVICTIONS THAT DO NOT COMPORT WITH THE SIXTH AMENDMENT CANNOT BE USED TO MEET THE PRIOR CONVICTION ELEMENT OF §117 BECAUSE THE LACK OF COUNSEL RENDERS THEM UNRELIABLE.

A. This Court's jurisprudence establishes that reliability is a core concern of the Sixth Amendment's right to counsel, both as entry of a conviction in the first instance and as use of that conviction in a later prosecution.

Mr. Bryant was not provided the opportunity for court-appointed counsel in tribal court. The misdemeanor

convictions that resulted from those uncounseled proceedings, therefore, do not meet constitutional requirements as applied in a subsequent federal prosecution. The Government attempts to escape this result by simply proclaiming the United States Constitution does not apply in Indian country. *See* Pet'r Br. 28-29. That proclamation fails to account for longstanding Sixth Amendment jurisprudence that is grounded in reliability concerns, as well as this Court's decisions regarding prior convictions. Mr. Bryant's tribal court convictions violate the Sixth Amendment because he was imprisoned as a result of them and was not provided counsel. This Court's holdings do not change that fact, nor do the holdings permit the Government's use of the uncounseled misdemeanor tribal court convictions as an element in a subsequent federal §117 prosecution.

1. In a series of cases from *Powell v. Alabama* through *Scott v. Illinois*, this Court established that having counsel from the outset of a prosecution is critical to the reliability of any conviction that results.

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution dictates a fair trial is one where evidence that is subject to adversarial testing is presented to an impartial tribunal for resolution of

elements defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards are essential to the criminal justice system. The right to counsel is one of those safeguards. This Court has indicated "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]" *Id.*

The right to counsel was first challenged in *Powell v. Alabama*, 287 U.S. 45 (1932), where the defendants who faced the death penalty did not have attorneys even on the morning of their trial. *Id.* at 54-56. This Court reversed the Alabama Supreme Court's holding that such a delay in appointing the defendant an attorney did not violate his state constitutional right to counsel. *Id.* at 59-60. Citing the Due Process Clause of the Fourteenth Amendment to United States Constitution, this Court stated that the defendant's right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. A defendant's right to be heard through counsel, therefore, was an "immutable principle[ ] of justice." *Id.* at 68 (citation omitted). Because,

> [e]ven the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is

> incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Id. at 69.

This Court's decision in *Powell* did not implicate the Sixth Amendment, yet its reasoning that a defendant "lacks both the skill and knowledge adequately to prepare his defense" and thereby "requires the guiding hand of counsel at every step in the proceedings against him" laid the foundation for the decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938), which did rely upon the Sixth Amendment. *Id.*

In *Johnson*, this Court built upon *Powell* to establish the right to counsel as a constitutional mandate under the Sixth Amendment stating the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself." *Johnson*, 304 U.S. at 462-463. Absent waiver, the right to counsel under the Sixth Amendment is a jurisdictional prerequisite to any deprivation of life and liberty. *Id.* at 464-465 (A loss of fundamental rights by acquiescence is not presumed. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

More than twenty years later, in a landmark decision, this Court held the United States Constitution requires appointment of counsel for all indigent defendants charged with any felony. *Gideon v. Wainwright*, 372 U.S. 335, 340-341, 345 (1963). In so holding, this Court again returned to the principles established in *Powell*, indicating differences exist between a trained attorney and a layperson and holding that a layperson must have the guiding hand of counsel to assist him with his defense. *Id.* at 343-345.

This Court then established a bright line rule when deciding *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), effectively concluding the criminal justice system tolerates less reliability for judgments obtained without counsel where only a fine is imposed. But this Court did not abandon its commitment to the rule that counsel must be provided when a defendant's liberty is lost.

Particularly, the right to counsel was extended to misdemeanor offenses in *Argersinger* because a defendant must be appointed counsel if the defendant receives imprisonment for the offense. *Argersinger*, 407 U.S. at 36-38, 40. Regardless of the severity of the offense, assistance of counsel "has relevance to any criminal trial[ ] where an accused is deprived of his liberty." *Id.* at 32. Similarly, in *Scott* the Court reinforced the distinction that an indigent defendant who is charged with a misdemeanor offense and who receives a sentence of imprisonment – as opposed to just a fine – is entitled to counsel under the Sixth

Amendment to the United States Constitution. *Scott*, 440 U.S. at 373-374.

The Government questions whether the bright line established in *Scott* still holds. *See* Pet'r Br. 49. The line is bright and this Court has been clear why it must be so. That is because "any deprivation of liberty is a serious matter." *Argersinger*, 407 U.S. at 41 (Burger, J., concurring). The deprivation is so serious, in fact, as to require a different process whereby counsel is provided. *Scott*, 440 U.S. at 373. Consequently, when a person is subjected to imprisonment and is not given counsel, the resulting convictions are not reliable because they have not been vetted through a process deemed fundamentally fair.

2. In *Burgett v. Texas*, *United States v. Tucker*, and *Loper v. Beto*, this Court established that an uncounseled conviction cannot be used in a later prosecution for another offense, whether as an element of that offense or for sentencing on it, because the uncounseled conviction is inherently unreliable.

In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court held a conviction that violates the precepts affirmed in *Scott* cannot be relied upon in a prosecution for another offense. *Burgett*, 389 U.S. at 114-115. This holding would seem to end the inquiry on this case. The Government, however, seeks to avoid *Burgett* by arguing that because the Sixth Amendment does not

apply to tribal court proceedings, *Burgett* also does not apply because the defect of not having counsel is not being exploited to Mr. Bryant's detriment in his §117 prosecution. *See* Pet'r Br. 29.

In first confronting the issue of whether uncounseled convictions could be used in a subsequent proceeding, this Court indicated "[t]o permit a conviction obtained in violation of Gideon v. Wainwright to be used against [the defendant] either to support guilt or enhance punishment for another offense is to erode the principle of [*Gideon*]." *Burgett*, 389 U.S. at 115 (citation omitted). Years later, and for the same reasons, this Court remanded the defendant's case in *United States v. Tucker* for re-sentencing because the uncounseled convictions were improperly used during sentencing. 404 U.S. 443, 449 (1972). Then, in *Loper v. Beto*, 405 U.S. 473 (1972), this Court held improper the use of uncounseled convictions to impeach a defendant-witness during cross-examination because such use violates the defendant's Sixth Amendment right and impairs the reliability of those convictions. *Id.* at 483.

Taken together, *Burgett*, *Tucker*, and *Loper* have, at their core, concerns about the reliability of the prior convictions when those convictions are used in subsequent proceedings, as this Court later observed in *Lewis v. United States*, 445 U.S. 55 (1980). Specifically, the *Burgett*, *Tucker*, and *Loper* courts "found that the subsequent conviction or sentence [involved in those cases] violated the Sixth Amendment

because it depended on the reliability of a past uncounseled conviction." *Lewis*, 445 U.S. at 67.

3. *Lewis v. United States*, which permits the use of a prior uncounseled conviction to establish an element of the offense of possession of a firearm by a convicted felon, creates only a narrow exception to the principle that reliability is a fundamental concern of the Sixth Amendment right to counsel.

The defendant in *Lewis* was a convicted felon who was found to be in unlawful possession of a firearm. *Lewis*, 445 U.S. at 56-57 The federal firearms statute at issue in *Lewis* (18 U.S.C. §1202(a)(1)) prohibited a convicted felon from having a firearm in his possession. *Id.* at 57. At his trial, Lewis's prior uncounseled convictions were allowed into the record. *Id.* This Court ultimately held "that §1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds." *Id.* at 65. In so holding, this Court recognized a class of persons who could not possess firearms regardless of whether the convictions that prevented them from possessing firearms were counseled or not. *Id.* at 67.

The *Lewis* holding does not, however, alter the fact a prior conviction turns on whether a defendant had counsel in the prior proceeding. First, enforcement of the federal firearm law in *Lewis* was just that

– enforcement. Being unable to possess a firearm was a "civil disability." *Id.* The focus of the prosecution in *Lewis* was not on the prior conviction as an element of the offense as it is in Mr. Bryant's case. It was on the defendant possessing an item he was not legally supposed to possess. *Id.*

Second, *Lewis* did not overrule *Burgett*. Rather, *Burgett* still holds an earlier felony conviction obtained in violation of the Sixth Amendment cannot be used to support guilt in a subsequent offense. *Burgett*, 389 U.S. at 114-115. *Lewis* is also undercut by *Custis v. United States*, 511 U.S. 485 (1994) – a decision that even relies on *Lewis*. *Custis* made clear a defendant may collaterally attack the use of an uncounseled prior conviction in the context of a later prosecution when it is used to enhance his sentence. *Custis*, 511 U.S. at 497.

Third, this Court's focus in *Lewis* was not on reliability as it was in *Burgett*, *Scott*, and *Loper*. *Id.* at 66-67. Rather, the analysis undertaken in *Lewis* concerned a statutory interpretation for which no legislative history existed to suggest Congress was willing to permit a defendant to question the validity of his prior conviction as a defense under §1202(a). *Lewis*, 445 U.S. at 60-62.

Fourth, this Court indicated the defendant in *Lewis* was not without relief by this Court's holding because he could seek relief from the civil disability by pardon or with the Secretary's consent. *Id.* at 64. He could also seek habeas relief in federal court

under a 28 U.S.C. §2255 petition. Mr. Bryant, however, has no further remedy in federal court. Even though he has a right to pursue habeas relief under 25 U.S.C. §1303, he does not meet the threshold requirement to pursue such relief to challenge his tribal court convictions obtained without counsel because he did not have counsel initially. Habeas corpus relief, therefore, is a right rendered virtually meaningless without the benefit of counsel – a benefit Mr. Bryant did not have and, apparently, was never advised of. *Id.*; Brief of National Congress of American Indians as *Amicus Curiae* at 10.

Accordingly, reliance on *Lewis* is misplaced.

B. Because reliability is the core concern underlying the exclusion in subsequent prosecutions of prior convictions that do not meet the Sixth Amendment standards for right to counsel, the *Burgett* rule of exclusion must apply to all prior uncounseled convictions regardless of the court from which they arise even when applying *Nichols*.

Faced with the issue of whether a defendant's uncounseled misdemeanor conviction could be used to enhance a subsequent misdemeanor to a felony, this Court decided *Baldasar v. Illinois*, 446 U.S. 222 (1980). In this per curiam decision, Justice Stewart was joined in concurrence by Justice Brennan and Justice Stevens indicating that an uncounseled misdemeanor conviction could not be used to enhance a

subsequent misdemeanor to a felony because the defendant was sentenced to an increased term of imprisonment solely due to his prior conviction that was obtained in violation of *Scott*. *Id.* at 224 (Stewart, J., concurring).

The fractured *Baldasar* decision created confusion among the circuit courts. Realizing as much, this Court decided *Nichols v. United States*, 511 U.S. 738 (1994), holding an "uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Nichols*, 511 U.S. at 746-747.

The issue in *Nichols* concerned the defendant's sentence and the fact that under the United States Sentencing Guidelines (USSG), his sentence was increased by one point due to a prior uncounseled DUI conviction. *Id.* at 740-741. That one point made a difference in his sentence of 25 additional months. *Id.* at 741. Adhering to *Scott*, this Court noted if the defendant's original uncounseled conviction did not result in actual imprisonment then no violation of the Sixth Amendment inhered. *Id.* at 746.

This Court overruled *Baldasar* in *Nichols*, leaving as guidance that a misdemeanor conviction, valid under *Scott*, can be used in a subsequent proceeding when determining a sentence enhancement through the sentencing guidelines or as part of a recidivist statute. *Id.* at 748-749. "Reliance on such a conviction is . . . consistent with the traditional understanding of the sentencing process[.]" *Id.* at 747.

Such a sentencing process includes a "wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993).

Although this Court did not say that its rule applied to proof of an element of a federal offense, the Government seeks such an application. *See* Pet'r Br. 38. However, the citation the Government provides to support extending *Nichols* underscores this Court's consideration of the issue as it concerns – not the guilt phase of a case – but the sentencing phase of a case. *See Nichols*, 511 U.S. at 747. This Court discussed recidivist statutes and sentencing enhancements in the context of whether a prior uncounseled conviction, which is valid under *Scott*, can be used to enhance a defendant's *punishment* under a subsequent prosecution. *Id. Nichols* does not hold that reliance on prior convictions cannot create a Sixth Amendment violation where one did not previously exist. *See* Pet'r Br. 39. The holding in *Nichols* is actually contingent upon a valid prior conviction under *Scott*.

The Government leans on the fact that *Nichols* overruled *Baldasar* and *Ant* cited to *Baldasar*. Pet'r Br. 31. However, *Ant* did not rely on *Baldasar* in ultimately holding the defendant's guilty plea, which was constitutionally infirm because he did not have counsel, was inadmissible in a subsequent federal prosecution. In fact, *Ant* made only a passing reference to *Baldasar* in the overarching discussion of an

individual's Sixth Amendment right to counsel at the time the person pleads guilty. *See Ant*, 882 F.2d at 1394.

Overruling *Baldasar* in the context of sentencing does not equate to a complete disregard of all reasoning contained within the separate opinions of the *Baldasar* per curiam decision. This is especially true where *Ant* and *Bryant* establish fundamentally different contexts for use of the prior convictions. *Nichols* overruled *Baldasar* because *Baldasar* incorrectly concluded the defendant's prior misdemeanor conviction in that case was invalid under *Scott*. *See Nichols*, 511 U.S. at 746-747. The defendant's prior misdemeanor conviction in *Baldasar* was actually valid under *Scott* (because he received no sentence of incarceration) which is why under *Nichols*' rationale, it could have then been used to enhance the defendant's punishment in the subsequent recidivist prosecution. *Id.*

Here, Mr. Bryant was not given counsel on the tribal court proceedings for which he was convicted and incarcerated. Using the prior convictions to prove an element of a federal offense thus violates *Scott* and *Argersinger*.

C. This Court's precedent after *Lewis* and *Nichols* establishes the Government's arguments – that Mr. Bryant's uncounseled tribal court convictions can be used to establish an element of §117 – fail in light of the Sixth Amendment's continued core concern about the reliability of the prior convictions.

After deciding *Lewis*, this Court returned to a reliability analysis in *Alabama v. Shelton*, 535 U.S. 654 (2002), and affirmed the limited reach of *Nichols*. The defendant in *Shelton* was convicted of a class A misdemeanor offense which had a possible maximum punishment of one year imprisonment. *Shelton*, 535 U.S. at 658. He was not afforded an attorney during his proceedings, was convicted of the misdemeanor offense, and was sentenced to a 30-day suspended sentence. *Id.* The defendant in *Shelton* challenged his conviction on Sixth Amendment grounds, arguing that he had a constitutional right to an attorney even though he received a suspended sentence. *Id.* at 658-659.

This Court agreed, holding a suspended sentence that "may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution for the crime charged." *Id.* at 658 (quoting *Argersinger*, 407 U.S. at 40). This Court in *Shelton* actually distinguished *Nichols* on the very basis Mr. Bryant argues herein, that is "[o]nce guilt has been established, [as] we noted in *Nichols*, sentencing

courts may take into account not only 'a defendant's prior convictions, but . . . also [his] past criminal behavior, even if no conviction resulted from that behavior.'" *Shelton*, 535 U.S. at 665 (quoting *Nichols*, 511 U.S. at 747).

The Government is incorrect in arguing under *Nichols* "the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction." Pet'r Br. 31. As indicated in *Shelton*, *Nichols* does not alter or diminish "*Argersinger*'s command" that a defendant shall not be imprisoned for an offense unless he is represented by counsel. *Shelton*, 535 U.S. at 664.

In fact, the same reasoning as articulated in *Shelton* applies. Mr. Bryant was "[d]eprived of counsel when . . . convicted[ ] and sentenced" in tribal court. *Shelton* 535 U.S. at 667. When those tribal court convictions are used as an element in a subsequent federal prosecution under §117, Mr. Bryant is unable to challenge those convictions, thereby facing federal conviction based on an element that has "never been subjected to 'the crucible of meaningful adversarial testing.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). Because uncounseled prior convictions resulting in imprisonment violate the Sixth Amendment, which is grounded in reliability, use of uncounseled tribal court convictions that result in imprisonment as an element in a subsequent prosecution is impermissible even under *Nichols*.

1. **The Government is incorrect that because the Sixth Amendment does not apply to tribal courts, it does not matter that Mr. Bryant's prior convictions did not comply with the Sixth Amendment's right to counsel standards in a subsequent federal prosecution.**

The uncounseled tribal court convictions the Government seeks to use in its §117 prosecution of Mr. Bryant are necessary to prove an essential element of the federal crime and, as such, must comport with the Sixth Amendment. The Government argues, however, the Sixth Amendment does not apply to Mr. Bryant's case much the same as it did not apply in *Nichols*. *See* Pet'r Br. 28-30. Even if Mr. Bryant's prior uncounseled tribal court convictions are valid under the Sixth Amendment for sentencing enhancement purposes (the *Nichols* situation), they cannot, under *Johnson* and *Gideon* be used to establish an element of the offense giving rise to that prosecution.

Burgett and *Nichols* both stand for the proposition that prior convictions must be vetted to ensure their reliability before they can be used as proof in a subsequent federal prosecution. *See Burgett*, 389 U.S. at 115; *Nichols*, 511 U.S. at 752 (Souter, J., concurring). Without such vetting, those prior convictions are defective and cannot thereafter be used as substantive proof. An uncounseled misdemeanor conviction used to enhance the defendant's sentence, as addressed in *Nichols*, is proper because the defendant, while

represented, has the opportunity to convince the judge before sentencing that his prior uncounseled conviction is unreliable. *Nichols*, 511 U.S. at 752 (Souter, J., concurring). A lesser standard of proof by the government concerning the prior conviction applies and the proof occurs during sentencing. *Nichols*, 511 U.S. at 747.

More than twenty years have passed since this Court's decision in *Nichols*. Opinions written by this Court since *Nichols* reinforce and supplement Mr. Bryant's arguments. Particularly, in his concurrence in *Apprendi v. New Jersey*, Justice Thomas discussed at length how courts have considered recidivism in sentencing since the country was founded. *Apprendi v. New Jersey*, 530 U.S. 466, 500-518 (2000) (Thomas, J., concurring). A longer sentence under a recidivist statute is "not to be viewed as . . . [an] additional penalty for the earlier crimes," but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (recidivist punishments do not subject defendants to double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment).

As indicated in *Apprendi*, the demarcation between an element and a sentencing factor was present in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the defendant was charged with violating a federal law that made it a crime for a deported alien to return to the United States. *Almendarez-Torres*, 523 U.S. at 226. In order to

establish the offense, the prosecutor had to prove two elements. *See* 8 U.S.C. §1326(a). The criminal penalty section for his offense then provided for an increased penalty where Mr. Almendarez-Torres's "removal was subsequent to a conviction for commission of an aggravated felony" and thereby faced imprisonment of not more than 20 years. *See* 8 U.S.C. §1326(b)(2). This portion of the statute, defendant argued, was an element of the crime thereby entitling him to heightened procedural protections including the right to counsel. *See Almendarez-Torres*, 523 U.S. at 239.

This Court rejected defendant's argument and distinguished sentencing factors from elements of a crime. *Id.* at 243-247. Where a statute incorporates a defendant's criminal past as part of increasing that defendant's sentence – rather than as part of establishing a crime was in fact committed – such incorporation does not create a separate offense within the law. *Id.* at 243. This is true because "recidivism 'does not relate to the commission of the offense, but goes to the punishment only.'" *Id.* at 244 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)).

Justice Thomas with whom Justice Scalia joined, indicated the Constitution required a broader rule than adopted by this Court in *Apprendi*. Namely, the definition of a "crime" includes "every fact that is by law a basis for imposing or increasing punishment." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). If a crime includes every fact that is a basis for imposing or increasing punishment, then Mr. Bryant's prior tribal court convictions referenced in §117 are an

integral part of the Government's proof of the crime. *Apprendi* held any fact other than a prior conviction that is used to increase the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476.

That holding is guided by the fundamental principles of a defendant's right to counsel, because a defendant's right to a jury trial includes his right to counsel. *See Argersinger*, 407 U.S. at 46 (Powell, J., concurring "If there is not an accompanying right to counsel, the right to trial by jury becomes meaningless."). The prior conviction exception exists because it is premised on the prior conviction having been "obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001).

It follows if Mr. Bryant's prior tribal court convictions were not obtained through proceedings that included the right to counsel, those prior convictions cannot later be used as an integral part of the Government's proof of the §117 crime. The uncounseled misdemeanor tribal court convictions here are being used as evidence to establish guilt of the §117 offense. Moreover, while the Government has relied heavily upon this perceived analysis of *Nichols*, if the facts of Mr. Bryant's case were applied to *Nichols*, his prior uncounseled domestic violence convictions in tribal court would not apply in the sentencing context of *Nichols*. Tribal court convictions are not assessed

criminal history points. USSG §4A1.2(i). It is illogical under the Government's argument to be able to use uncounseled tribal court convictions at the guilt phase, yet unable to use the tribal court convictions to assess criminal history points at the sentencing phase.

Additionally, the Government appears to argue federal courts should be required to accept tribal court convictions as predicates for §117 offenses on a blanket basis – that is, with no inquiry into the fairness of the particular tribe's criminal adjudicatory process or the procedures underlying a particular prior conviction. *See* Pet'r Br. 30-35. The Government's focus is unclear, however, whether it rejects the Ninth Circuit's holding in *Bryant* in favor of an opposite blanket rule or whether it seeks individualized review. What is clear, however, is that any approach permitting uncounseled tribal court convictions to be used as §117 predicates is fraught with unfairness and practical difficulties.

If this Court construes §117 to require blanket acceptance of tribal court convictions, Indians with convictions obtained in a summary proceeding presided over by a tribe's governor and counsel will be bootstrapped into elements of a new federal crime punishable by up to ten years in prison. So, too, will this occur for other Indians who are convicted and sentenced but who do not comprehend what occurs at trial or during a change of plea hearing because they do not have the guiding hand of counsel to assist

them. This Court need not articulate a rule treating tribal courts differently from other courts because under this Court's precedent no uncounseled conviction may be used as an element of a federal crime leading to imprisonment. *See Johnson*, 304 U.S. at 464-465; *Gideon*, 372 U.S. at 345.

Tremendous variation in the size, resources, and governmental structure exists in the 566 federally-recognized Indian tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 F.R. 4748-02. A correspondingly enormous variation also exists in the nature and functioning of the hundreds of courts the 566 federally-recognized Indian tribes operate.[1] A rule treating tribal courts as a monolithic unity, whose judgments are uniformly fit to become elements of a federal crime, would be no less absurd than a similar rule blindly accepting the judgments of the courts of any and all foreign nations as elements of a federal crime.

Indeed, an approach authorizing federal courts to review the fairness of tribal court procedures underlying §117 predicates seems, at first blush, like a reasonable compromise. But such an approach, while clearly preferable to a rule of blanket acceptance,

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[1] This diversity helps explain the widely varying approach that states have taken to the recognition of tribal civil judgments. Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 268-270 (Spring 2004).

begs a number of vexing questions, including whether a court should review the particular tribe's criminal procedures in general; and, if so, how that is accomplished since many of the tribes' codes and rules are not publicly available. Such realities underscore why uncounseled tribal court convictions should not be used to support federal sentences of incarceration. As former federal prosecutor (and Chickasaw Nation of Oklahoma member) Kevin Washburn has observed with respect to the federal sentencing guidelines, declining to permit uncounseled tribal convictions to be used in support of federally-imposed prison sentences treats these convictions "in a manner that is not disrespectful to tribal courts," by effectively extending the duty to supply appointed counsel only to "tribes wishing to have their tribal court sentences counted in federal sentencing." Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 448 (Spring 2004).

2. The Government's reliance on *Nichols* and related cases to argue that recidivist statutes "penalize only the last offense committed by the defendant" is misplaced in regards to Mr. Bryant.

Unlike a true recidivist statute, §117 does not increase punishment based on prior convictions. Instead, prior convictions are an element of the offense the Government must prove beyond a reasonable doubt. Remembering that *Nichols* is a punishment

case and Mr. Bryant's case is a guilt phase case is essential to this analysis as pointed out by Judge Paez. *Bryant*, 792 F.3d at 1043.

The Government's duty to establish guilt beyond a reasonable doubt is "a requirement and a safeguard . . . in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) ("[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition[ ] . . . has crystalized into rules of evidence[.] . . . These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.").

In order to establish the offense of an habitual offender in federal court, a prosecutor must prove beyond a reasonable doubt that (1) a present offense of domestic assault; (2) was committed within the maritime and territorial jurisdiction of the United States or Indian country; (3) by someone with at least two final convictions on separate prior occasions in federal, state, or Indian tribal court proceedings; (4) when that prior offense, if subject to federal jurisdiction, was one of assault, sexual abuse, a serious violent felony against a spouse or intimate partner or against a child of or in the care of the person committing the domestic assault. 18 U.S.C. §117(a)

(2014).[2] The Government must prove these elements beyond a reasonable doubt.

The Government's argument, however, appears to equate its burden to the less exacting standard required at sentencing much the same as the Amicus did in *Shelton*. *See* Pet'r Br. 34-35; *Shelton*, 535 U.S. at 665. In *Shelton*, however, this Court noted the "relaxed standard [in *Nichols*] has no application . . . where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to 'the guiding hand of counsel.'" *Shelton*, 535 U.S. at 665 (quoting *Argersinger*, 407 U.S. at 40).

Under *Nichols*, a valid misdemeanor conviction is one that complies with the Sixth Amendment. *Nichols*, 511 U.S. at 748-749. The defendant's conviction in *Nichols* comported with the Sixth Amendment because the defendant in that case did not receive a sentence of incarceration. *Id.* at 740. The defendant in *Nichols* need not, under *Scott*, be appointed counsel, so the defendant's sentence was consequently properly enhanced using the prior uncounseled misdemeanor conviction to do so. *Id.* at 748-749.

The Government has relied upon *Nichols* to argue that recidivist statutes "penalize only the last

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[2] The version applicable at the time of Mr. Bryant's indictment omits qualification of the offense based on it being a felony against a child of or in the care of the person committing the domestic assault.

offense committed by the defendant." Pet'r Br. 24. However, not one of the cases cited by the Government regarding recidivist statutes actually involves a situation, as here, where the prior conviction is an essential element in a subsequent prosecution.

Moreover, this Court has already adopted a similar view of another Sixth Amendment right – that of confrontation. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that out-of-court statements cannot be used at a defendant's trial unless the defendant had a prior opportunity to cross-examine the witness. Put differently, an earlier testimonial statement that the defendant had no opportunity to challenge cannot be used against him in a later prosecution because it violates the Sixth Amendment in that later proceeding. *Id.* at 68. Because Mr. Bryant did not have the benefit of counsel during his tribal court proceedings, the admission of those prior convictions as an element in his subsequent §117 prosecution is alone sufficient to violate the Sixth Amendment. A critical "indicium of reliability" necessary to satisfy the Constitution in the §117 prosecution is the right to counsel – a right established by the Constitution.

3. The Government's argument that the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but only an accompanying sentence of imprisonment misses the point.

The Government's argument that "whether obtained in tribal, state, or federal court, an uncounseled misdemeanor conviction is constitutionally valid, both in its own right and for use in a subsequent proceeding, even if the sentence of imprisonment is not" is both illogical and unsupported by this Court's precedent. *See* Pet'r Br. 33. The argument is counter to the concession the Government made before the Ninth Circuit during oral argument, where the Government agreed if Mr. Bryant's convictions were obtained in state or federal court they would be invalid. *See Bryant*, 769 F.3d at 673 ("The government did not contest Bryant's representation that he lacked the assistance of counsel during his prior tribal court proceedings and that his convictions would have violated the Sixth Amendment had they been obtained in state or federal court."). That point aside, the Government is arguing what matters to the analysis before this Court now is Mr. Bryant's conviction and not the jail time he served for both of his uncounseled misdemeanor tribal court convictions. *See* Pet'r Br. 34.

Assuming without conceding for the sake of the Government's argument Mr. Bryant's convictions in tribal court are valid when used in his subsequent

§117 prosecution, the Government fails to address how the sentence he received comports with *Shelton* and *Scott*. A sentence that risks deprivation of liberty cannot be imposed unless that defendant is given counsel. *See Shelton*, 535 U.S. at 658.

Sixth Amendment jurisprudence has its focus on a defendant's sentence only insofar as determining whether the defendant's crime imposes incarceration. The resulting sentence, therefore, is not what triggers reliability concerns as the Government asserts. *See* Pet'r Br. 40 ("A Sixth Amendment holding that a tribal-court misdemeanor conviction is deemed unreliable if tribal court imposed a sentence of imprisonment, but not if the court imposed a lesser sentence such as a fine, would . . . yield insupportable and incongruous results.").

Rather, if a defendant receives a prison sentence, that defendant is entitled to counsel. Failure to provide counsel renders any conviction and subsequent sentence invalid and unreliable. *Argersinger*, 407 U.S. at 34 ("Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."). Interpreting the Sixth Amendment in such a manner will actually yield results that conform to this Court's constitutional precedent dating as far back as *Powell*.

4. The Government's argument that uncounseled convictions may be used in later prosecutions without creating Sixth Amendment concerns if the defendant waived counsel in the earlier proceedings or was not indigent and elected to retain counsel is beside the point.

The Government also suggests if this Court does not adopt an expansive view of *Nichols*, "the use of *any* uncounseled conviction in a subsequent proceeding, without regard to whether the absence of counsel violated the defendant's Sixth Amendment rights" would be called into question. Pet'r Br. 37, n.8 (emphasis in original). The Government cites to examples including a defendant who has waived his right to counsel or a defendant who can afford to hire counsel but chooses not to do so. *Id.* The inherent problem with the Government's argument is that under those examples the defendant has made a knowing, intelligent, and voluntary decision not to exercise his right to counsel thereby accepting the present and future ramifications of his decision. Mr. Bryant here did not have a similar choice. A defendant cannot intelligently waive something that does not exist. *See Johnson*, 304 U.S. at 464-465.

Even under *Nichols*, this Court has required the prior conviction to be obtained in accordance with *Scott*. The Government should not be able to sidestep away from a fundamental requirement by simply proclaiming the Constitution does not apply to tribes

and ICRA controls. Doing so actually ignores this Court's holding in *Nichols*. *See Nichols*, 511 U.S. at 749 (an uncounseled misdemeanor conviction may be used for subsequent sentencing enhancement purposes, so long as the prior conviction comports with *Scott*).

D. This Court should hold the Sixth Amendment forbids the use of an uncounseled prior misdemeanor conviction resulting in a term of imprisonment to satisfy the prior convictions element of a subsequent §117 offense.

The Government contends "[s]ection 117(a) is concerned with the fact of the tribal-court conviction, not the sentence [Mr. Bryant] received, and his misdemeanor *convictions* would be valid in state and federal court, even if the accompanying sentences of imprisonment would not." Pet'r Br. 35 (emphasis in original). The Government cannot prove, however, that Mr. Bryant has two final convictions that would each qualify as an assault "if subject to Federal jurisdiction," without also considering whether those convictions "if subject to Federal jurisdiction" are valid in federal court as the Ninth Circuit held in *Bryant*. *See* 18 U.S.C. §117(a)(1); *Bryant*, 769 F.3d at 677. Since Mr. Bryant received sentences of incarceration for his misdemeanor convictions, if subject to Federal jurisdiction for those offenses, he would have been entitled to counsel under *Scott*. Since he did not have counsel, his convictions when used in federal

court are invalid because they violate the Sixth Amendment.

The Government argues "[u]nder *Nichols*, the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction." Pet'r Br. 31. The Government wants the focus just to be on validity so the Government can argue that, because Mr. Bryant's convictions were valid under ICRA, they can be used as proof in a subsequent prosecution without question. Inclusive in a validity analysis of a prior conviction is the Sixth Amendment and its attendant jurisprudence like *Scott* and its progeny.

The holding in *Scott* is not about adjudicating guilt. *See* Pet'r Br. 33. It is about determining when counsel must be afforded to a defendant before adjudication. A defendant does not need the guiding hand of counsel if the crime to which he is subject does not result in incarceration. *See Scott*, 440 U.S. at 373-374. Misdemeanor convictions and corresponding sentences in those situations are thereby valid and reliable only if they comport with *Scott* and its progeny. *Id.* However, when a defendant receives jail time for his misdemeanor offense without the guiding hand of counsel, the resulting misdemeanor conviction is invalid and unreliable because the conviction does not comport with *Scott* and its progeny.

Again, even under this Court's holding in *Nichols*, the prior misdemeanor conviction must be valid under *Scott* which has its basis in the Sixth Amendment.

This Court should hold the same is true for Mr. Bryant's misdemeanor tribal court convictions when those convictions are later used as an element in a §117 federal prosecution.

II. THE GOVERNMENT'S DUE PROCESS CHALLENGE IS NOT A SEPARATE SUBSTANTIVE OR PROCEDURAL DUE PROCESS CHALLENGE, NOR IS IT PROPERLY PRESERVED.

A Sixth Amendment analysis governs this case and should be applied accordingly. If this Court holds against Mr. Bryant on the Sixth Amendment argument, however, this Court should not decide this issue based on Due Process but rather remand Mr. Bryant's case to the Ninth Circuit for its decision on that basis.

A. Any Due Process discussion was intermingled with the Sixth Amendment challenge.

Mr. Bryant did not make a separate substantive or procedural due process challenge in his motion to dismiss before the district court. Rather, to the extent he challenged Due Process, it was based on the Government using uncounseled tribal court convictions that violated the Sixth Amendment in his current federal prosecution. Defendant's Brief in Support of Motion to Dismiss Indictment, United States v. Bryant, Case No. CR-11-70-BLG-JDS, ECF Doc. 20,

at 5 (D. Mont. 11/07/11) ("Relying on un-counseled tribal convictions violates 'anew' the Sixth Amendment right to counsel and Due Process in this case."). Any Due Process violation came, therefore, as a result of the Sixth Amendment violation and Mr. Bryant's argument continued in that vein. He then focused his argument, alternatively, on an Equal Protection challenge. *Id.* at 8-11.

In the Government's five-page response to his motion to dismiss, the Government argued no Sixth Amendment violation existed due to tribal courts being judicial branches of sovereign bodies. United States' Response to Defendant's Motion to Dismiss Indictment, United States v. Bryant, Case No. CR-11-70-BLG-JDS, ECF Doc. 21, at 1-3 (D. Mont. 11/14/11). The Government continued that the prosecution of Mr. Bryant under 18 U.S.C. §117 did not violate Equal Protection because distinctions based on tribal affiliations were not invidious race-based distinctions. *Id.* at 3-4.

At the motion hearing, Mr. Bryant never once discussed Due Process as a stand-alone violation. Instead, Mr. Bryant's core argument was on the Sixth Amendment violation inherent in the Government's prosecution of him, as was the Government's focus in its response. *See* Pet'r App. at 23a-26a, 29a-31a. The district court ruled from the bench denying Mr. Bryant's motion, indicating "the convictions and the pleas do not meet the criteria for the charge that's been filed here." Pet'r App. at 32a.

Mr. Bryant's opening brief before the Ninth Circuit mentioned Due Process only in passing in delineating the issue presented but did not discuss a stand-alone Due Process violation. Brief of Appellant, United States v. Bryant, Case No. 12-30177, ECF Doc. 4, at 9, 13-31 (9th Cir. 08/31/12). Rather, Mr. Bryant centered his argument on the Sixth Amendment and Equal Protection challenges made before the district court. *Id.* The Government also mentioned Due Process in its heading, but its response too was on the Sixth Amendment and Equal Protection. Brief of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 15, at 7-8, 11-18 (9th Cir. 11/15/12). Mr. Bryant's reply brief indicated §117 violated the Fifth and Sixth Amendments because it permitted the Government to use uncounseled tribal court convictions as an element to prove commission of the crime, again evidencing a Due Process discussion that was intermingled with the Sixth Amendment challenge. Reply Brief of Appellant, United States v. Bryant, Case No. 12-30177, ECF Doc. 20, at 7-16 (9th Cir. 12/13/12). The Sixth Amendment was pivotal for both parties in supplemental briefing.

The Ninth Circuit then decided Mr. Bryant's case based on a Sixth Amendment analysis and denied the Government's petition for rehearing en banc on the same basis. *See Bryant*, 769 F.3d 671; *Bryant*, 792 F.3d 1042. The petition for rehearing briefing, again, did not focus on a Due Process challenge by itself. *See* Petition for Rehearing En Banc of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 56

(9th Cir. 12/15/14); Response to Petition for Rehearing En Banc of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 62 (9th Cir. 03/17/15). The first time Due Process became a separate issue was the Government's petition for a writ of certiorari before this Court, which Mr. Bryant argued this Court should decline to review. *See* Pet'r Pet. at 16-19; Resp. Opp. at 22.

Mr. Bryant reiterates here this Court should reject any attempt by the Government to reverse the Ninth Circuit's decision in this case based on a constitutional provision not addressed by the court of appeals. This Court has emphasized it "is a court of final review and not first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (citation omitted); *See also Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been its considered practice [for this Court] not . . . to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") (citations omitted).

The Government has presented this Court with "no reason to abandon [its] usual procedures in a rush to judgment without a lower court opinion." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *See also e.g., United States v. Apel*, 134 S. Ct. 1144, 1153 (2014) (declining to reach respondent's

alternative constitutional argument in support of judgment below where "the Court of Appeals never reached [respondent's] constitutional arguments").

To the extent this Court entertains Due Process principles, this Court should do so as Mr. Bryant addressed them in the preceding argument when those principles interplay with the Sixth Amendment analysis.

B. This Court should not address the Due Process issue the Government now presents in its merits brief because that issue was not embraced by the Question Presented before this Court in the Government's petition for a writ of certiorari.

Regarding the Due Process Clause, the Government takes the position for the first time in its merits brief that Mr. Bryant's prior tribal court convictions are not categorically unreliable because Mr. Bryant did not object to certain paragraphs in the presentence report (PSR).[3] *See* Pet'r Br. 55. This argument

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[3] In its petition for a writ of certiorari, the Government discussed *Lewis* as it targeted Congress's rationale in drafting a statute. *See* Pet'r Pet. at 17; *see also Lewis*, 445 at 62. The Government then expanded its Due Process argument in its merits brief arguing under *Lewis* the mere fact of Mr. Bryant's tribal court convictions is sufficient for use in the §117 prosecution without having to consider Mr. Bryant's prior convictions under the categorical approach doctrine. *See* Pet'r Br. 41; *Lewis*, 445 U.S. at 66.

warrants scrutiny for several reasons, chief among them being the Government appears to be arguing either that the categorical approach does not apply to alleged prior tribal court convictions in a §117 prosecution; or that Mr. Bryant has knowingly and intelligently waived the protections the categorical approach was designed to afford.

Neither of these assertions is correct and/or supported by the record in this case. Furthermore, determination of categorical reliability of a prior conviction for use at the guilt phase or the sentencing phase of a proceeding involves application of settled principles established by this Court. *See e.g.*, *Taylor v. United States*, 495 U.S. 575, 602 (1990) (an offense constitutes "burglary" under the federal statute if it has the basic elements of a "generic" burglary or if the charging document and the jury instructions actually require the jury to find all the elements of generic burglary in order to convict). The very scope of the Government's argument on this point suggests this case may become moot. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (It is the duty of counsel to bring to the federal tribunal's attention, "*without delay*," facts that may raise a question of mootness.) (emphasis in original).

In Cause No. 14-10154, this Court will determine whether a defendant's prior conviction for domestic assault can serve as a predicate for criminal liability in a proceeding for unlawful firearm possession under 18 U.S.C. §921(a)(33)(A) and §922(g)(9). More specifically in *Voisine v. United States*, U.S. Sup. Ct.

Docket No. 14-10154, this Court will resolve whether a prior conviction for domestic assault committed with a *mens rea* of recklessness can serve as a predicate in a §922(g)(9) prosecution. *Cf. United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (recognizing under this Court's decision in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), the courts of appeals have almost uniformly held recklessness is not sufficient).

Here, the tribal code section under which Mr. Bryant was convicted for domestic assault authorizes conviction – not only for intentional conduct – but for reckless and negligent conduct as well.[4] The Government acknowledges as much. Pet'r Br. 7, n.4. Yet, the Government appears to seek a rule from this Court holding tribal court convictions exempt from application of the categorical approach whereby the tribal court convictions can be proved at trial anew like the circumstances-based approach for prior convictions under *United States v. Hayes*, 555 U.S. 415 (2009), and *Nijhawan v. Holder*, 557 U.S. 29 (2009); *See also United States v. Berry*, ___ F.3d ___, 2016 WL 682978 (4th Cir. 2016) (distinguishing between categorical and non-categorical approach to prior sex convictions).

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[4] "Any person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse." Northern Cheyenne Tribal Code 7-5-10(A).

The tribal code at issue here (7-5-10) is non-divisible and thereby not subject to the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2285 n.2 (2013) (Indivisible statutes may contain alternative means of committing the crime. Divisible statutes may contain alternative elements of functionally separate crimes.). And, regardless of whether the categorical approach applies, the more concerning aspect of the Government's contention is its attempt to have this Court create a *Lewis*-type rule as applied to tribal court convictions. That is, the Government seeks a decision from this Court holding the mere fact of a tribal court conviction – whether counseled or not, whether reliable or not, whether proven or not – matters not to the Government's subsequent §117 prosecution, even though the tribal court convictions are used as an element in that §117 prosecution. Mr. Bryant has argued why the outcome of this case is dictated by *Burgett* and not by *Lewis* and reiterates those arguments here.

Finally, if Mr. Bryant's prior tribal court charges are to be tried anew as a non-categorical matter in the district court in the context of his §117 prosecution, Mr. Bryant has appointed counsel in that proceeding rendering the Sixth Amendment issue in this case moot. And, in any case, none of this was argued by either party in the courts below and whether the *Taylor* categorical approach applies to tribal court prior convictions in a §117 prosecution is not fairly raised in the Question Presented by the Government's petition for a writ of certiorari.

C. If this Court reaches the Government's Due Process argument, §117 deprives Mr. Bryant and others like him of Due Process.

The Government jumps into a discussion about Congress's intent in enacting §117 as its first point under the Due Process heading, arguing Congress could rationally conclude uncounseled tribal court convictions could be used to prove guilt of the §117 crime because the mere fact of his conviction is all that is concerned. *See* Pet'r Br. 41-43, citing *Lewis*. The Government does not articulate what substantive or procedural due process violation exists in this case that it is attempting to defend. The Government instead uses rationality discussion to discuss the policies underlying the statute – a discussion that injects a factual dissertation about domestic violence that need not be addressed when looking at the Sixth Amendment violation here.

Mr. Bryant is fully cognizant of the legislative intent of §117 and wholly recognizes courts presume the legislature intended to enact a constitutional law. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Nevertheless, the presumption, even coupled with an important goal, is not definitive. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92-93 (1921) ("not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution").

For the Government to use the *Lewis* decision to argue this Court must focus on the mere fact of conviction is to disregard the limitations inherent in *Lewis*. In the limited context of the civil disability ban on possession of firearms, the fact a person was convicted with or without counsel is not dispositive because even where not explicitly proscribed by the Bill of Rights, criminal procedures violate Due Process where they "offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted). Section 117 fails this test in several ways.

As this Court has held, Due Process requires a defendant to be convicted only upon reliable evidence – one component that is met with effective assistance of counsel. "The requirement that a jury's verdict 'must be based on the evidence developed at the trial' goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, ***and of counsel***." *Id.* at 472-73 (emphasis added).

Under the Government's view, an essential element of the new §117 offense may be conclusively established by the result of a prior proceeding where

the defendant did not have counsel. The absence of counsel raises reliability problems with respect to that result. Of course, where the defendant had the right to counsel in the previous proceeding, the evidentiary use of the result of that proceeding does not offend Due Process. But, where the prior conviction was obtained without the assistance of counsel, the use of the prior conviction as "evidence" means that an essential element of the new offense has been established without "full judicial protection of the defendant's right . . . of counsel." *Id.* at 473.

Even before this Court held the Sixth Amendment applied directly to the states, this Court held the right to counsel was so fundamental as to constitute a component of Due Process. *See Powell*, 287 U.S. at 69 (a defendant who lacks the skills and knowledge to prepare his defense "requires the guiding hand of counsel at every step in the proceedings against him"); *Gideon*, 372 U.S. at 340 (the Sixth Amendment right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, such that it is obligatory on the states by the Fourteenth Amendment").

The use of uncounseled convictions to establish an essential element of §117 impermissibly dilutes the fundamental constitutional requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The

standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'") (quoting *Coffin v. United States*, 153 U.S. 432, 453 (1895)). Where an unreliable uncounseled prior conviction is allowed to establish an essential element of a new felony offense (as a proxy for the dangerousness of the defendant), the reasonable doubt standard cannot serve its function as "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. at 363.

For any, or all, of the foregoing reasons, §117 does not comport with Due Process

D. Section 117 is not the only tool available to combat domestic violence nor has Mr. Bryant advocated for its complete non-use.

This Court should note 25 U.S.C. §1304(d)(4) requires a defendant to receive "all other rights whose protection is necessary under the Constitution of the United States," including the right to court-appointed counsel. Any concerns that this Court's decision affirming the Ninth Circuit will all but write §117 off the books is availed by §1304. The Government and Amici Curiae treat the Ninth Circuit's holding in

Bryant as though a §117 prosecution can never occur again.[5]

Section 117 is not rendered obsolete by the Ninth Circuit's holding in *Bryant*. Mr. Bryant has never argued – nor did the Ninth Circuit hold – that tribal court convictions can never be used in a subsequent federal §117 prosecution by the Government. Rather, Mr. Bryant has always maintained – and the Ninth Circuit agreed – that if the Government seeks to use prior tribal court convictions as an element in a subsequent federal §117 prosecution, the tribal court convictions must have been obtained in accordance with *Scott*. That is, (1) if a defendant was imprisoned for the tribal court offenses, he must have received counsel during the proceedings for those offenses; or (2) if a defendant was not imprisoned for the tribal offenses, he need not have received counsel.

The Government can use §117 as a tool so long as its use of the prior tribal court convictions comport

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[5] *See* Brief of Dennis K. Burke, Former United States Attorney, District of Arizona, et al., as *Amici Curiae* at 14 ("We . . . urge the Court to preserve this tool [§117] as a necessary component of the comprehensive efforts to reduce violent crime on reservations."); Brief of National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault as *Amici Curiae* at 29 ("[Mr. Bryant's] attempt to eviscerate the application of §117(a) to repeat offenders such as himself . . . threatens not only the safety of Native women, but the integrity and ability of Congress to fully effectuate its trust responsibility to Indian Nations and their citizens.").

with the Sixth Amendment. In fact, Amicus states §117 "gives federal prosecutors an additional tool to ensure that victims of domestic violence living on reservations are afforded similar protection against their abusers to victims who live in non-Indian Country jurisdictions." Brief for Dennis K. Burke, Former United States Attorney, District of Arizona, et al., as *Amici Curiae* at 11. If the Government seeks to give Indians similar protections under §117 prosecutions, it fails to do so by affording them less protections when using their uncounseled misdemeanor tribal court convictions in violation of *Scott*, because non-Indians' prior misdemeanor convictions when used as an element under §117 prosecutions comport with the Sixth Amendment.

Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). Rather, "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Somportex Limited v. Philadelphia Chew Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). In general, courts recognize the judgments of foreign courts so long as (1) those judgments are rendered by impartial tribunals and do not violate due process, or (2) the rendering court had the proper jurisdiction over the person, according to the foreign state's laws. Restatement (Third) of Foreign Relations §482 (1987). Comity, therefore, may be extended to foreign judgments but does not have to be so extended. The decision not to extend comity to a foreign judgment

may be based on public policy. *Hilton*, 159 U.S. at 170.

The importance of the right to counsel under the Sixth Amendment for the reasons already articulated is *the* policy reason not to extend comity to misdemeanor tribal court convictions obtained in violation of *Scott*. Because, without such a holding by this Court preventing use of uncounseled misdemeanor tribal court convictions as an element in a subsequent §117 prosecution, the Government will be able to proceed with convicting an Indian in federal court without meeting its burden of proof. Committing violence to the United States Constitution cannot stand in this regard.

CONCLUSION

This Court should affirm the Ninth Circuit's judgment. A categorical rule should be declared that tribal court convictions obtained in violation of *Scott* shall not be used by the Government in a subsequent habitual offender prosecution. Should this Court not declare such a categorical rule, however, this Court should at a minimum place the burden on the Government to prove the prior tribal court convictions

upon which it relies are reliable in prosecuting a defendant as an habitual offender.

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No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

Respondent readily acknowledges (Br. 3) that his multiple tribal-court misdemeanor convictions for domestic assault are valid and did not violate the Constitution when they were obtained. See Pet. App. 7a-8a. He has never disputed the accuracy of those convictions or denied that he committed the many acts of domestic violence to which he pleaded guilty in tribal court. Although respondent received misdemeanor sentences for repeatedly choking, kicking, punching, kneeing, and beating his intimate partners, that did not stop his pattern of abuse. Congress enacted 18 U.S.C. 117(a) to address the jurisdictional vacuum that permitted offenders like respondent to harm their domestic partners in Indian country again and again, while facing only misdemeanor punishment reserved for minor crimes. By creating a federal felony that "represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize," Congress acted to "protect[]

tribal women and their children from generations of abuse." Pet. App. 41a (Owens, J., dissenting from denial of rehearing en banc).

Respondent asks this Court (Br. 8-9) to declare Section 117(a) unconstitutional as applied to repeat offenders whose prior tribal-court convictions—although valid—were uncounseled and resulted in a sentence of imprisonment. Nothing justifies that gutting of the statute. Because the Sixth Amendment was not violated when respondent's tribal-court convictions were obtained, that Amendment does not bar reliance on his valid convictions in a subsequent prosecution. And because Congress rationally made any tribal-court domestic-violence conviction, whether or not it was counseled or resulted in imprisonment, a predicate for a Section 117(a) prosecution, respondent has no valid claim that the statute violates due process. The Court should reject respondent's effort to transform his tribal-court sentences of imprisonment for his prior crimes into a shield that insulates him from prosecution under Section 117(a).

A. Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions In A Section 117(a) Prosecution Does Not Violate The Sixth Amendment

Respondent asserts (Br. 9-13) that all uncounseled convictions are unreliable, even if they did not violate the Sixth Amendment in the original proceeding. He contends (Br. 13-15) that the Sixth Amendment therefore forbids reliance on his uncounseled tribal-court misdemeanor convictions to satisfy a prior-conviction element of a recidivist crime. This Court's precedents refute respondent's premise and foreclose his claims.

1. In contending that uncounseled convictions are categorically unreliable, respondent observes (Br. 10)

that this Court has emphasized that the right to counsel functions as a "safeguard[] [that is] essential to the criminal justice system." Thus, he concludes (Br. 13), when convictions are obtained without the aid of counsel, they are so "inherently unreliable" that their subsequent use to prove a defendant's recidivist status violates the Sixth Amendment.

Respondent's reliability argument conflicts with this Court's recognition in *Scott* v. *Illinois*, 440 U.S. 367 (1979), that the Sixth Amendment does not require a right to appointed counsel to fairly convict a defendant in a misdemeanor prosecution. The holding in *Scott* that counsel is necessary only if the defendant is actually imprisoned demonstrates that, even in the absence of counsel, misdemeanor prosecutions are sufficiently reliable to find guilt beyond a reasonable doubt, to enter a conviction, to impose a criminal fine, and to subject a defendant to various collateral consequences.

Respondent asserts (Br. 12) that the Court in *Scott* and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), "effectively conclud[ed] [that] the criminal justice system tolerates less reliability for judgments obtained without counsel where only a fine is imposed." The "central premise" of the *Scott/Argersinger* rule, however, is not that reliability may be disregarded when a defendant is exposed to lesser sanctions, but that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Scott*, 440 U.S. at 373. The *Scott/Argersinger* line reflects that counsel has a particularly important role to play when imprisonment is at stake, including in mitigating that penalty by, for example, negotiating a plea bargain that reduces the term of imprisonment. See *Arger-*

singer, 407 U.S. at 34. Those cases should not be interpreted to suggest that our society is unconcerned with the accuracy of a criminal proceeding that does not result in imprisonment. Accordingly, while access to counsel undoubtedly helps to safeguard the fairness and reliability of criminal proceedings, *Scott* and *Argersinger* demonstrate that the absence of counsel does not render all misdemeanor convictions unfair and unreliable.

This Court's decision in *Nichols* v. *United States*, 511 U.S. 738 (1994), confirms that point. If, as respondent maintains, all uncounseled convictions are unreliable, then reliance on such convictions as an accurate indicator of a defendant's recidivist status would be suspect, even if the prior convictions were valid under *Scott* because no imprisonment was imposed. Justice Marshall adopted precisely that view in *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), reasoning that the subsequent use of a valid but uncounseled conviction violates the Constitution because of reliability concerns. *Id.* at 227-228. The dissent in *Nichols* likewise believed that the Sixth Amendment precludes reliance on uncounseled convictions in a later prosecution because of "the inherent risk of unreliability." 511 U.S. at 763 (Blackmun, J., dissenting).

But the *Nichols* majority did not agree. It "overrule[d] *Baldasar*" and held that a valid uncounseled conviction remains "valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-749.[1] *Nichols* accordingly recognized that a valid

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[1] Respondent contends (Br. 20) that "*Nichols* overruled *Baldasar* because *Baldasar* incorrectly concluded the defendant's prior misdemeanor conviction in that case was invalid under *Scott*." That is not correct. The per curiam decision in *Baldasar* expressly

uncounseled conviction is sufficiently reliable not only to justify the punishment imposed in the original proceeding, but also to support the defendant's subsequent classification as a recidivist. And that makes sense: It would be strange to find an uncounseled conviction too unreliable in a recidivist prosecution to believe that the defendant committed the prior offense, when the original proceedings were sufficiently reliable to adjudicate the defendant guilty beyond a reasonable doubt.

Notably, respondent recognizes (Br. 35-36, 50) that uncounseled convictions may be relied upon in a later prosecution in a variety of circumstances without violating the Sixth Amendment, notwithstanding his reliability concerns. Respondent concedes (Br. 50) that if the tribal court had sentenced him to a fine rather than imprisonment, his convictions would be valid to prove his recidivist status in a Section 117(a) prosecution. He also acknowledges (Br. 35-36) that an uncounseled conviction may be relied on subsequently if the defendant waived his right to counsel or was not indigent and so lacked a right to appointed counsel in the prior proceeding. And respondent does not dispute that the Sixth Amendment permits reliance in a criminal prosecution on a prior civil adjudication, in which the defendant would not have had a right to appointed counsel. See U.S. Br. 27-28.

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recognized that the prior conviction was valid because the defendant was not incarcerated. 446 U.S. at 222. *Nichols* overruled *Baldasar* not because it had made a factual error about the conviction's validity, but because *Nichols* "agree[d] with the dissent in *Baldasar* that," as a matter of "logic[]," a conviction that is valid for its own purposes is also valid for use in a subsequent proceeding. 511 U.S. at 746-747.

But respondent does not explain why those uncounseled convictions or civil adjudications would be deemed sufficiently reliable to justify a recidivist prosecution, while an uncounseled tribal-court conviction that results in imprisonment would not. In all of the examples, the absence of counsel could theoretically undermine the accuracy of the prior proceedings and so trigger respondent's proposed Sixth Amendment rule. Respondent's resistance to the logical consequences of his position demonstrates that his Sixth Amendment analysis is unsound.

2. Rather than adopt a free-floating reliability analysis, *Nichols* establishes that the Sixth Amendment limitation on the subsequent use of an uncounseled conviction turns on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. U.S. Br. 23-26.[2] Respondent asserts (Br. 17-20) that the analysis in *Nichols* should be limited to sentencing enhancements and does not extend to statutes like Section 117(a) that make a prior convic-

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[2] *Nichols*'s focus on the validity of the prior conviction is consistent with *Burgett* v. *Texas*, 389 U.S. 109 (1967), *United States* v. *Tucker*, 404 U.S. 443 (1972), and *Loper* v. *Beto*, 405 U.S. 473 (1972) (plurality opinion). Respondent states (Br. 14) that those decisions "have, at their core, concerns about the reliability of the prior convictions." But the cases did not turn on abstract reliability concerns unmoored from whether the prior proceeding complied with the Sixth Amendment. Rather, in each case the defendant had previously been convicted of a felony without the assistance of counsel in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and the Court reasoned that the subsequent use of the invalid convictions would perpetuate the *Gideon* violation and so cause the principle of that case "to suffer serious erosion." *Burgett*, 389 U.S. at 116; *Tucker*, 404 U.S. at 449; *Loper*, 405 U.S. at 481-482 (applying same rationale under due process).

tion an element of a recidivist offense. That argument lacks merit.

a. Respondent offers no tenable argument why a distinction between an element and a sentencing enhancement makes sense in this context. The substantive use of the prior conviction—to classify who qualifies as a recidivist and thus should be subject to habitual-offender liability or punishment—is the same. And in both instances, the mere existence of the prior conviction suffices to establish that the defendant is properly treated as a habitual offender. Thus, as this Court suggested in *Burgett* v. *Texas*, 389 U.S. 109 (1967), the same Sixth Amendment analysis should apply whether an uncounseled conviction is used "to support guilt *or* enhance punishment for another offense." *Id.* at 115 (emphasis added).

Respondent emphasizes (Br. 30-31) that the government bears the burden of proving a prior-conviction element beyond a reasonable doubt, which should not be "equate[d] * * * to the less exacting standard required at sentencing." It is of course true that different standards of proof apply at the guilt and punishment phases, but respondent does not explain why that difference should trigger divergent Sixth Amendment constraints on the subsequent use of an uncounseled conviction. The focus of proof in both contexts is on the *fact* of conviction, not on whether the defendant committed the underlying conduct.

Nor does treatment of a prior conviction as an element rather than a sentencing factor trigger a constitutional need for greater assurance that the defendant in fact committed the prior offense. A prior conviction itself establishes past criminal conduct; recidivist proceedings do not reopen that question. See *Graham*

v. *West Virginia*, 224 U.S. 616, 624 (1912). Thus, to prove a prior-conviction element, the government offers evidence that the conviction exists, without relitigating the defendant's culpability. Respondent's argument (Br. 48) that reliance on an uncounseled prior conviction at the guilt stage "impermissibly dilutes" the beyond-a-reasonable-doubt standard therefore lacks merit.

b. Respondent erroneously reads *Nichols* (Br. 23) to "stand for the proposition that prior convictions must be vetted to ensure their reliability before they can be used as proof in a subsequent federal prosecution." Respondent cites Justice Souter's concurrence in the judgment, which expressed the view that valid, uncounseled convictions may be considered at sentencing so long as they do not result in an automatic enhancement, because the defendant will have "the chance to convince the sentencing court of the unreliability" of any such conviction. 511 U.S. at 752.

Justice Souter wrote separately, however, precisely because the Court did not adopt that limitation. As Justice Souter observed, the sentencing scheme in *Baldasar* would not satisfy his test because it provided for an "automatic enhancement based on prior uncounseled convictions." *Nichols*, 511 U.S. at 751. *Nichols* nevertheless expressly overruled *Baldasar* and held that an uncounseled conviction that did not violate the Sixth Amendment when it was entered may be used to "enhance punishment at a subsequent conviction," *id.* at 748-749—even in cases, like *Baldasar*, where the enhancement is automatic and the sentencing court cannot disregard the prior conviction based on reliability concerns.

c. Respondent emphasizes (Br. 18-19) that *Nichols* observed that its holding was "also consistent with the traditional understanding of the sentencing process," during which a judge may conduct a broad inquiry into the defendant's background and sentence him "more severely based simply on evidence of the underlying conduct that gave rise to the previous" uncounseled conviction. 511 U.S. at 748. That observation reflects that many constitutionally permissible avenues exist for considering a defendant's criminal history at sentencing. But it does nothing to diminish *Nichols*'s holding that the Sixth Amendment is not violated if a court relies solely on the fact of a valid uncounseled conviction to establish that the defendant is a recidivist. The more relaxed standards at sentencing made it particularly clear that reliance on such a conviction, representing a finding of guilt beyond a reasonable doubt, formed a legitimate basis for enhancing a sentence. *Ibid.* But that same legitimate basis for treating a defendant as a repeat offender exists when a jurisdiction makes the fact of recidivism, proven by a prior adjudication of guilt beyond a reasonable doubt, an offense element.

Notably, the validity of the prior conviction, rather than the sentencing context, is what distinguished *Nichols* from *United States* v. *Tucker*, 404 U.S. 443 (1972), in which the Court held that a sentencing judge's reliance on uncounseled convictions that violated *Gideon* required resentencing. The *Tucker* Court recognized that sentencing courts have wide discretion in imposing sentences and may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *Id.* at 446, 449. Yet

Tucker held that, because the prior conviction had been obtained in violation of the Sixth Amendment, "[e]rosion of the Gideon principle can be prevented * * * only by" resentencing the defendant. *Id.* at 449.

Like *Tucker*, *Nichols* treats the validity of the conviction in the original proceeding as the touchstone for determining whether the subsequent use of that conviction violates the Sixth Amendment. Because that holding has equal application to a prior-conviction element, respondent cannot dismiss *Nichols* as a punishment case.

d. Citing *Alabama* v. *Shelton*, 535 U.S. 654 (2002), respondent claims (Br. 21-22) that this Court has "affirmed the limited reach of *Nichols*" to situations where "guilt has been established" before an uncounseled conviction is considered. But the question presented in *Shelton* did not concern the permissible uses of prior convictions in a subsequent prosecution; rather, the Court considered only whether the Sixth Amendment requires appointed counsel to sentence a defendant to a suspended term of imprisonment. 535 U.S. at 662. In analyzing that issue, *Shelton* distinguished *Nichols* because "the critical point" in *Nichols* "was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned," *id.* at 664—just as respondent had a recognized right to counsel in his Section 117(a) prosecution. *Shelton* thus reaffirmed *Nichols*'s point that the sentence imposed in a recidivist prosecution is attributable to the instant conviction, and not to predicate prior convictions in which the defendant lacked the assistance of counsel. See *ibid.*

e. Respondent disputes that point (Br. 7) by contending that when a prior conviction is an element of a subsequent offense, the defendant "face[s] incarceration" in the federal proceeding "based in part on convictions that were uncounseled." Respondent asserts (Br. 29) that Section 117(a) is "[u]nlike a true recidivist statute," which this Court has repeatedly held "penalize[s] only the last offense committed by the defendant," because it makes prior convictions relevant to establishing guilt. But respondent cites no authority to support his claim that a sentence imposed for a Section 117(a) crime should be imputed to the prior convictions that made the defendant eligible for prosecution under that statute. That suggestion contradicts longstanding authority recognizing that governments have wide discretion in how to structure recidivist proceedings. See *Spencer* v. *Texas*, 385 U.S. 554, 566-569 (1967).

Contrary to respondent's contention, Section 117—which is titled "Domestic assault by *an habitual offender*"—functions like other recidivist provisions. 18 U.S.C. 117 (emphasis added). It is violated only when a person with two prior domestic-violence convictions "commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country." *Ibid.* The statute clearly penalizes the last offense and relies on the existence of the prior convictions to identify the class of offenders who should be subject to that penalty. That the sorting occurs at the guilt stage rather than the punishment stage does not alter the function of the prior convictions to limit the Section 117(a) penalty to recidivists. Section 117(a) therefore fits comfortably within the long line of this Court's precedents holding that recid-

ivist statutes do not impose additional punishment for prior crimes, but rather provide "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948).

f. Taking respondent's element-based theory to its logical end, any uncounseled conviction—even one obtained in compliance with *Scott*—would violate the Sixth Amendment if used to prove an element of a recidivist offense. That result would resurrect *Baldasar*'s creation of a class of "hybrid" convictions that are valid for purposes of imposing punishment in the original prosecution, but invalid when used in a subsequent prosecution. *Nichols*, 511 U.S. at 744-745; *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting). Having overruled *Baldasar* in *Nichols*, the Court should decline to return to a Sixth Amendment analysis that uncouples the permissibility of relying on a prior conviction from the conviction's validity.

3. Respondent alternatively seeks (Br. 19) to avoid *Nichols* by arguing that its application is "contingent upon a valid prior conviction under *Scott*." Because the tribal court sentenced respondent to imprisonment for his domestic-violence crimes, he observes (Br. 36) that he would have had a right to appointed counsel if he had been sentenced in state or federal court. Thus, although he acknowledges (Br. 37) that his uncounseled tribal-court convictions are valid and were lawfully used to impose a sentence of imprisonment in the tribal proceeding, he contends that the analysis in *Nichols* does not apply to those convictions. That argument is wrong for multiple reasons.

First, *Nichols*'s Sixth Amendment rule that a valid uncounseled conviction remains valid when used in a

subsequent prosecution logically applies to any uncounseled conviction that did not violate the Sixth Amendment when it was entered, and is not limited based on *Scott*. Respondent emphasizes the facts of *Nichols*, but fails to explain why they circumscribe the case's rationale. Contrary to respondent's argument, courts have recognized, for example, that the Sixth Amendment permits reliance on a prior civil adjudication to establish an element of a recidivist offense even though the defendant had no right to appointed counsel in the civil proceeding. See, *e.g.*, *United States* v. *Rivera-Sillas*, 417 F.3d 1014, 1017-1018 (9th Cir. 2005) (rejecting argument that 8 U.S.C. 1326, which criminalizes unlawful reentry following deportation, violates the Sixth Amendment because it makes an administrative adjudication, in which the defendant had no right to appointed counsel, an element of a subsequent felony offense), cert. denied, 546 U.S. 1120 (2006). The same analysis applies to uncounseled tribal-court convictions that did not violate the Sixth Amendment at the time they were imposed because of the Amendment's inapplicability to tribal-court proceedings.

Second, uncounseled misdemeanor convictions are valid under *Scott* and may be relied upon in a subsequent proceeding even if a defendant was unconstitutionally sentenced to imprisonment in the original prosecution. U.S. Br. 33-35.[3] *Scott* makes clear that,

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[3] Respondent and his amici are therefore wrong to contend that non-Indians receive more favorable treatment under Section 117(a) than Indians. Resp. Br. 51; Professor Barbara L. Creel et al. Amicus Br. 13-20. All uncounseled misdemeanor convictions are valid under *Scott* and so may be used subsequently, no matter

in misdemeanor cases, the absence of counsel bars only a sentence of imprisonment, not an adjudication of guilt. See 440 U.S. at 373-374. Respondent observes (Br. 32) that even if his tribal-court convictions were valid, his sentences of imprisonment would have contravened *Scott* had they been imposed by a state or federal court. But Section 117(a) is not concerned with what *sentence* a defendant previously received for a domestic assault; rather, the recidivist element is satisfied based on the existence of two prior *convictions*. Respondent further asserts (Br. 34) that, under *Argersinger*, a prison sentence renders an accompanying uncounseled misdemeanor conviction invalid. But *Argersinger* did not say that the unconstitutional imposition of a term of imprisonment would invalidate the conviction itself.

Third, although respondent grounds his Sixth Amendment analysis in reliability concerns, his argument that his tribal-court sentences should control the permissibility of using his convictions in a federal-court proceeding is entirely disconnected from those concerns. Imagine, for example, that respondent's tribal-court record remained unchanged in all respects except that he was twice fined instead of imprisoned for committing domestic violence. Because those uncounseled convictions would be based on exactly the same evidence and would be obtained using identical procedures, their reliability would stand on the same plane as respondent's own convictions. Yet respondent concedes (Br. 50) that those uncounseled convictions could be used to satisfy Section 117(a)'s prior-conviction element. The Court should reject respond-

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where they were rendered and no matter whether a sentence of imprisonment was unlawfully imposed.

ent's counterintuitive effort to escape prosecution under Section 117(a) based on his tribal court's sentencing determinations.

B. Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions In A Section 117(a) Prosecution Does Not Violate Due Process

Respondent does not dispute that Congress's decision to permit reliance on uncounseled tribal-court convictions is subject to rational-basis review. U.S. Br. 41-43; see *Lewis* v. *United States*, 445 U.S. 55, 65 (1980).[4] And respondent does not contend that it was irrational for Congress to address the acute problem of domestic violence in Indian country by closing the jurisdictional gap that permitted recidivist offenders to avoid felony-level punishment despite repeated acts of violence. U.S. Br. 43-48. Instead, respondent attempts to avoid decision on whether Section 117(a) complies with due process and renews his claim that

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[4] Respondent emphasizes (Br. 15-16) that the criminal prosecution in *Lewis* enforced a civil firearms disability, which he contends distinguishes the felon-in-possession offense from Section 117(a). It is true that Section 117(a) does not enforce a civil disability; rather, the statute takes an act that is *already* criminal—domestic assault—and creates a felony offense if an individual commits that unlawful act after having previously been twice convicted of domestic violence. But that difference does not create a constitutional infirmity. In fact, as Judge Watford observed, greater caution is required when relying on "uncounseled prior convictions in prohibiting firearms possession, because that prohibition impinges upon what would otherwise be a fundamental right." Pet. App. 19a. In contrast, it does not "imping[e] upon anyone's rights when [Congress] prohibit[s] (or enhance[s] penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Ibid.*

uncounseled convictions are unreliable. Those arguments lack merit.

1. Respondent urges the Court (Br. 38-42) not to consider whether Section 117(a) survives scrutiny under due process principles because he asserts he did *not* press that claim below and it was not the basis of the court of appeals' decision. But the Ninth Circuit understood respondent to be raising a due process claim, Pet. App. 4a, and he is apparently unwilling to concede that he forfeited that claim, see Resp. Br. 38 (requesting a remand for the court of appeals to consider due process). Moreover, as respondent acknowledges (Br. 38), the due process and Sixth Amendment issues are closely linked in this context. Cf. *Loper*, 405 U.S. at 480 (relying on due process to analyze whether uncounseled felony conviction could be introduced into evidence for impeachment purposes in a subsequent prosecution). Because respondent's reliability concerns sound equally in due process, it would make little sense to confine the analysis in this case to the Sixth Amendment.

Indeed, in analogous circumstances—including in *Lewis* and *Nichols*—this Court has addressed the constitutionality of a statute under the Fifth Amendment even when the lower court decision was focused on the Sixth Amendment. See *Lewis*, 445 U.S. at 65 (holding that subsequent reliance on an uncounseled felony conviction was "consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment," even though the lower court did not expressly address that issue and the defendant raised only a Sixth Amendment claim in his opening brief); *Nichols*, 511 U.S. at 748-749 (rejecting a due process argument in addition to a Sixth Amendment

argument even though the lower court had not addressed due process); see also, *e.g.*, *Kentucky* v. *Stincer*, 482 U.S. 730, 744-745 (1987) (reversing lower court decision that was based solely on the Sixth Amendment and holding that the defendant's exclusion from a witness competency hearing did not violate the Confrontation Clause or due process). Accordingly, a complete analysis encompasses the due process issue in this case.

2. a. In arguing that it was irrational for Congress to permit reliance on uncounseled tribal-court misdemeanor convictions that resulted in imprisonment, respondent reiterates (Br. 46-49) his view that those convictions are unreliable.[5] That argument fares no better under due process than it does under the Sixth Amendment. See pp. 3-6, *supra*; U.S. Br. 48-54. Because respondent cannot establish that uncounseled misdemeanor convictions are categorically unreliable, he cannot invalidate Section 117(a) on that ground.[6]

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[5] Pursuing a different tack, amici Criminal Justice Organizations and Scholars contend (Br. 7-18) that Section 117(a) should be interpreted to exclude uncounseled tribal-court convictions. That argument lacks merit. Amici cite the presumption that Congress legislates with awareness of existing law, but that presumption refutes their claim because it shows that Congress enacted Section 117(a) with awareness that defendants have no right to appointed counsel in tribal-court misdemeanor proceedings. U.S. Br. 42; cf. *United States* v. *First*, 731 F.3d 998, 1007 (9th Cir. 2013), cert. denied, 135 S. Ct. 50 (2014). Amici also invoke (Br. 9-12) the canon that ambiguous statutes should be construed liberally in favor of Indians. But no ambiguity exists: Section 117(a) plainly covers all tribal-court convictions. In any event, a liberal construction should favor the Indian victims of domestic violence, not the Indian perpetrators who repeatedly abuse their intimate partners.

[6] Perhaps because the government's opening brief used the term "categorically" (meaning "without exception") when discussing

b. Respondent's amici focus more narrowly on tribal-court prosecutions, contending that various procedural infirmities render tribal-court adjudications unfair. See National Ass'n of Criminal Def. Lawyers (NACDL) et al. Amicus Br. 11-34; see also Resp. Br. 27-28. This Court should resist NACDL's invitation to hold Section 117(a) unconstitutional on the basis of those dated anecdotal attacks.

Both in permitting uncounseled tribal-court convictions to serve as predicate offenses for a Section 117(a) crime and in determining which procedural protections to confer under the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, Congress has determined that tribal courts may fairly and reliably adjudicate the guilt of uncounseled defendants in misdemeanor prosecutions. See U.S. Br. 48-52. Tribal justice systems—and the right to counsel in particular—have been the focus of congressional hearings and debates, and Congress has confirmed its confidence in tribal courts by "repeatedly recogniz[ing] tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and

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reliability, respondent contends (Br. 43) that the categorical approach governs whether a tribal-court conviction qualifies as a predicate offense under Section 117(a). Respondent further contends (Br. 44-45) that the tribal provision he violated "is nondivisible and thereby not subject to the modified categorical approach." As respondent recognizes (Br. 45), those arguments fall outside the question presented and are not properly considered in this case, which involves only whether reliance on uncounseled tribal-court misdemeanor convictions violates the Constitution. Respondent's arguments address the different question whether his particular tribal-court convictions qualify as predicates under Section 117(a). Respondent has never argued that his convictions do not qualify. Accordingly, he has forfeited that argument.

property rights on Native lands." 25 U.S.C. 3651(6) (enacted in 2000); see 25 U.S.C. 3601(6) (similar finding enacted in 1993). While Congress has provided tribal-court defendants with a federal habeas corpus remedy, 25 U.S.C. 1303, it has rejected proposals for expanded federal-court oversight of tribal-court proceedings. See S. Rep. No. 153, 102d Cong., 1st Sess. 55-61 (1991) (relying on report by the U.S. Commission on Civil Rights, which conducted a five-year review of tribal governments and recommended against increased federal-court review of tribal-court judgments). Congress is well positioned to gather information about how tribal courts operate, to assess their overall fairness, and to devise tailored solutions to any problems it identifies in tribal criminal-justice systems. This Court should not usurp Congress's role and nullify a central application of Section 117(a) based on impressionistic assertions about unfairness in tribal-court proceedings.

In any event, NACDL's depiction of tribal-court criminal-justice systems rests primarily on one-sided anecdotal accounts that do not reflect any comprehensive study of how tribal courts function.[7] In stark contrast to NACDL's portrayal, commenters have observed that "[w]hen tribal courts have been sub-

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[7] For example, NACDL discusses the 2003 tribal prosecution of Fortino Alvarez at length. NACDL Br. 11, 14-15. But NACDL ignores that Alvarez's allegations about procedural deficiencies at his trial were largely rejected by the magistrate judge and the district court. See *Alvarez* v. *Tracey ex rel. Gila River Indian Cmty. Dep't of Rehab. & Supervision*, No. 08-cv-2226, 2012 WL 1038755, at *1 (D. Ariz. Feb. 10, 2012), report and recommendation adopted *sub nom.*, No. 08-cv-02226, 2012 WL 1038746 (D. Ariz. Mar. 28, 2012), aff'd, 773 F.3d 1011 (9th Cir. 2014) (declining to consider the claims based on the failure to exhaust).

jected to intense scrutiny" in congressional hearings and academic studies, "they have survived the test." Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 287 (1997); see, *e.g.*, Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. Rev. 553, 584-588 (2009) (citing studies "conclud[ing] that tribal courts are generally as fair and impartial as their state and federal counterparts").

NACDL selectively cites cases (Br. 29) that it contends demonstrate that tribal courts may not "be relied upon to enforce ICRA rights." But scholars and practitioners who have studied the application of ICRA have concluded that "[t]ribal courts have developed substantive ICRA doctrines with real bite." Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 522 (2000); see, *e.g.*, Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 489 (1998) (examining thirty years of litigation under ICRA and concluding that "tribal courts have been no less protective of civil rights than have federal courts"); *Cohen's Handbook of Federal Indian Law* § 14.04[2], at 988 (Nell Jessup Newton et al. eds., 2012) (citing studies that contradict the notion that "tribal courts are incapable or unwilling to enforce" ICRA). Notably, as evidence for the proposition that tribal courts do not faithfully enforce ICRA, NACDL cites (Br. 29 & nn.106-107) Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness:* Indian Courts

and the Future *Revisited*, 84 U. Colo. L. Rev. 59 (2013). But NACDL ignores the author's conclusion that courts that have declined to rely on ICRA generally have done so "to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in the areas of due process and equal protection." *Id.* at 91.

NACDL's suggestion that tribal-court proceedings are fundamentally unfair is further contradicted by the decisions of state and federal courts that have credited tribal-court judgments as reliable in a variety of contexts. See U.S. Br. 52-54; National Congress of Am. Indians Amicus Br. 14-18.[8] Under the Sentencing Guidelines, for example, federal courts may rely on tribal-court convictions as the basis for an upward departure if they conclude that those convictions reliably indicate that the defendant's criminal-history category is inadequate. See Sentencing Guidelines § 4A1.3(a)(1) and (2)(A). Federal courts routinely find that tribal-court convictions satisfy that test. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 436 (2004) ("Despite the general rarity of upward departures, federal judges have often used the existence of a lengthy tribal criminal history to justify an upward departure

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[8] Respondent contends (Br. 51-52) that the absence of counsel in tribal-court misdemeanor prosecutions provides a "policy reason not to extend comity" to those convictions under Section 117(a). But Congress *mandated* that those convictions count under Section 117(a). The respect routinely accorded to tribal-court judgments in other contexts where that matter is left to courts' discretion simply confirms that Congress acted rationally in making tribal-court convictions predicates in a Section 117(a) prosecution.

in Indian country cases.") (footnote omitted).[9] That judgment merits more respect than NACDL's generic allegations of "incompetence," which the Court has previously rejected as the basis for "attacks on tribal court jurisdiction." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18-19 (1987).

c. If the Court finds that Section 117(a) does not facially violate the Constitution, respondent urges the Court (Br. 27-29, 52) to recognize a right of individualized review of predicate tribal-court convictions in Section 117(a) prosecutions. That argument is not properly presented here. Respondent has never sought such review of his convictions; instead, he has argued only that uncounseled tribal-court misdemeanor convictions that resulted in imprisonment are categorically unavailable for use in a federal proceeding. Because an as-applied due process challenge has not been preserved or briefed, the Court should not consider the question whether a defendant may

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[9] Respondent argues (Br. 27) that it would be "illogical" to rely on uncounseled tribal-court convictions in a prosecution under Section 117(a) because the Sentencing Guidelines do not assign criminal-history points based on tribal offenses. Sentencing Guidelines § 4A1.2(i). But the Guidelines permit reliance on tribal-court convictions for the related purpose of granting an upward departure when a defendant's criminal-history category is understated, Sentencing Guidelines § 4A1.3(a)(1) and (2)(A), and consideration of tribal-court convictions "is generally encouraged" under that provision. *United States* v. *Lonjose*, 42 Fed. Appx. 177, at *3 (10th Cir.), cert. denied, 537 U.S. 984 (2002). In any event, the Guidelines' approach to tribal-court convictions does not align with respondent's constitutional analysis because Section 4A1.2(i) treats all tribal-court convictions the same, whether or not they were counseled or resulted in imprisonment.

collaterally challenge his tribal-court convictions in a Section 117(a) prosecution.

At a minimum, a defendant raising a collateral attack should have to show that his particular tribal-court proceedings were so procedurally defective that they "effectively eliminate[d] [his] right * * * to obtain judicial review," notwithstanding ICRA's guarantee of a federal habeas corpus remedy. Cf. *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 839 (1987) (recognizing limited right to collaterally challenge an administrative deportation order in a prosecution for illegal reentry following deportation); *Daniels* v. *United States*, 532 U.S. 374, 383 (2001) (plurality opinion) (reserving whether 28 U.S.C. 2255 permits a defendant to collaterally attack a prior conviction used to enhance a federal sentence in the "rare case[] in which no channel of review was" previously available "due to no fault of [the defendant's] own"). A defendant should also have to show that the tribal-court proceedings were fundamentally unfair and caused him to suffer actual prejudice. Cf., *e.g.*, *United States* v. *Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994). The Court should reserve judgment on those issues until they are presented in a case, unlike this one, in which a defendant alleges and can demonstrate that his tribal-court prosecutions were fundamentally flawed.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2016

No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL J. BRYANT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Dennis K. Burke, Former United States Attorney, District of Arizona; Paul K. Charlton, Former United States Attorney, District of Arizona; Thomas B. Heffelfinger, Former United States Attorney, District of Minnesota; David C. Iglesias, Former United States Attorney, District of New Mexico; Brendan V. Johnson, Former United States Attorney, District of South Dakota; and Timothy Q. Purdon, Former United States Attorney, District of North Dakota, as *Amici Curiae* Supporting Petitioner

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Thomas B. Heffelfinger, Paul K. Charlton, David C. Iglesias, Brendan V. Johnson, Dennis K. Burke, and Timothy Q. Purdon[2] are former presidentially appointed United States Attorneys with experience in the prosecution of violent crimes, including domestic violence offenses, in "Indian Country," as defined by 18 U.S.C. § 1151. Specifically:

- Thomas B. Heffelfinger was appointed by both President George H.W. Bush and President George W. Bush as United States Attorney for the District of Minnesota and served from 1991 to 1993 and from 2001 to 2006. During a portion of his time as U.S. Attorney, he served as the Chair of the Attorney General's Advisory Committee's

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

[2] Although Amicus Thomas B. Heffelfinger is a partner at Best & Flanagan LLP, Amicus Paul K. Charlton is a Partner at Steptoe & Johnson LLP, Amicus David C. Iglesias is a Professor at Wheaton College, Amicus Brendan V Johnson is a Partner at Robins Kaplan LLP, Amicus Dennis K. Burke is a Principal at Global Security & Innovative Strategies, and Amicus Timothy Q. Purdon is a Partner at Robins Kaplan LLP, they join this brief solely in their personal capacities, they do not represent or advise the Petitioner in this or any matter, and they have not been involved in this case apart from filing this brief as *amici curiae*.

(the "AGAC") Native American Issue Subcommittee (the "NAIS").[3]

- Paul K. Charlton was appointed by President George W. Bush as United States Attorney for the District of Arizona and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- David C. Iglesias was appointed by President George W. Bush as United States Attorney for the District of New Mexico and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Brendan V. Johnson was appointed by President Barack Obama as United States Attorney for the District of South Dakota and served from 2009 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

- Dennis K. Burke was appointed by President Barack Obama as United States Attorney for

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[3] The AGAC was created in 1973 to serve as the voice of the U.S. Attorneys and to advise the Attorney General of the United States on policy, management, and operational issues impacting the offices of the U.S. Attorneys. The NAIS is comprised of U.S. Attorneys from across the United States whose districts contain Indian Country or one or more federally recognized tribes. The NAIS focuses exclusively on Indian Country issues, both criminal and civil, and is responsible for making policy recommendations to the Attorney General of the United States regarding public safety and legal issues that impact tribal communities.

the District of Arizona and served from 2009 to 2011. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Timothy Q. Purdon was appointed by President Barack Obama as United States Attorney for the District of North Dakota and served from 2010 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

During their terms as United States Attorney, the *amici curiae* led United States Attorney's Offices that prosecuted violent crimes, including domestic violence offenses in Indian Country, under the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. In fact, Department of Justice statistics establish that the U.S. Attorney's Offices in Minnesota, Arizona, New Mexico, South Dakota and North Dakota—the offices the *amici curiae* led—prosecute the highest numbers of Indian Country criminal cases in comparison to most other U.S. Attorney's Offices.[4]

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[4] *See* U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2014*, http://www.justice.gov/tribal/file/796976/download (last visited Jan. 25, 2016); U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2013*, http://www.justice.gov/tribal/docs/icip-rpt-cy2013.pdf (last visited Jan. 25, 2016); U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2011-2012*, http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf (last visited Jan. 25, 2016).

All of the *amici curiae* prioritized the reduction of violent crime on reservations and tribal trust land within their jurisdictions during their time as U.S. Attorney and all are acutely aware of the jurisdictional challenges facing tribal, state, and federal law enforcement officers and prosecutors in their efforts to reduce violent crime, particularly domestic violence offenses, in Indian Country.

SUMMARY OF ARGUMENT

Former U.S. Attorney *amici curiae* Thomas B. Heffelfinger, Paul K. Charlton, David C. Iglesias, Brendan V. Johnson, Dennis K. Burke, and Timothy Q. Purdon can provide this Court with a unique perspective on 18 U.S.C. § 117(a). Each of us has served as a top-ranked federal prosecutor, each of us has firsthand experience with the prosecution of domestic violence offenses in Indian Country, and each of us recognizes the need for a tool like Section 117(a) to target habitual domestic violence offenders who pose the greatest risk of reoffending.

Domestic violence is an escalating crime, with repeat offenders tending to inflict more serious physical injuries upon their victims over time. Research also suggests that treating escalating domestic assaults with escalating criminal justice consequences reduces offender recidivism, which in turn saves lives.

U.S. Attorney's Offices can help to reduce domestic violence, and potentially save lives, on reservations by prosecuting domestic violence crimes before they become homicides. Allowing the Ninth Circuit's decision to stand would eliminate 18 U.S.C. § 117(a) as a critical law enforcement tool for prosecuting habitual

domestic violence offenders. *Amici curiae* recognize how Section 117(a) can help federal prosecutors protect victims of domestic violence who live on reservations by preventing habitual offenders from continuing their escalating patterns of abuse. Therefore, we urge the Court to preserve this tool as a necessary component of the comprehensive efforts to reduce violent crime on reservations, and reverse the Ninth Circuit's decision.

ARGUMENT

I. 18 U.S.C. § 117(A) IS A CRITICAL TOOL FOR FEDERAL PROSECUTORS TO PREVENT SERIOUS DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY

A. Domestic Violence Is an Escalating Crime

1. Many domestic violence offenders are recidivists

Empirical research shows that recidivism rates are extremely high among domestic violence offenders, suggesting that domestic violence offenders are particularly likely to reoffend. Numerous studies have documented the recidivist tendencies of domestic violence offenders. Some studies have estimated recidivism rates between forty percent and eighty percent "when victims are followed longitudinally and interviewed directly." Carla Smith Stover, *Domestic Violence Research: Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005).

Other studies that rely on police reports, rather than victim reports, estimate recidivism rates between twelve percent and twenty-one percent. *See* Julia C. Babcock et al., *Does Batterers' Treatment Work?: A*

Meta-Analytical Review of Domestic Violence Treatment, 23 Clinical Psychol. Rev. 1023, 1039 (2004); Donald G. Dutton & Kenneth Corvo, *Transforming a Flawed Policy: A Call to Revive Psychology & Science in Domestic Violence Research & Practice*, 11 Aggression & Violent Behavior 457, 460 (2006). However, these statistics likely underrepresent the actual number of cases of recidivism because domestic violence is widely believed to be underreported. *See* Babcock et al., *supra*, at 1039.

Equally significant, recidivism among offenders often occurs soon after the previous offense. *See* Rodney Kingsworth, *Intimate Partner Violence: Predictors of Recidivism in a Sample of Arrestees*, 12 Violence Against Women 917, 930 (2006). Studies uniformly show that for those abusers who reoffend, a majority do so within a short timeframe. *See* Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, Nat'l Inst. for Justice (June 2009). Many domestic violence offenders recidivate within six months after their initial assault or arrest. *See* J. David Hirschel & Ira W. Hutchinson, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. Crim. L. & Criminology 73, 116 (1992); Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. Fam. Violence 263 (1998).

2. Recidivist domestic violence offenders often escalate the severity of their offenses

The United States "witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014). This Court has observed that "[d]omestic violence often escalates in severity over time," and that "the presence of a firearm increases the likelihood that it will escalate to homicide." *Id.*

This Court's characterization in *Castleman* of domestic violence as an escalating crime is well supported by research. Multiple studies indicate that domestic violence generally escalates in severity over time. *See* Cynthia Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* 129 (1989) (explaining that the number of women hit with an object in the most serious violent incident was double the number hit with an object in the initial incident); Marie L. Crandell et al., *Predicting Future Injury Among Women in Abusive Relationships*, 56 J. Trauma-Injury Infection & Critical Care 906, 906 (2004) (finding that forty-four percent of women who were murdered by an intimate partner had received emergency room treatment within two years of the homicide and almost all had at least one emergency room visit for domestic violence injuries); Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Reports 409, 411–18 (2006) (discussing studies

that show that intimate partner violence increases in severity and frequency over time).

These studies show that domestic violence, unchecked, leads to harm with escalating levels of seriousness, with each subsequent act of physical violence by the offender tending to be more serious than the last, and inflicting increasing bodily harm upon the victim over time. Grabbing or shaking may lead to hitting or punching. Choking may follow. Each escalating incident heightens the risk of fatality to victims of domestic violence.

In addition, "[a]s this violence escalates, the likelihood that the violent incidents will involve the use of a weapon also increases." Allison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 Cornell L. Rev. 822, 824 (2000); *see also* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 901, 1155 (1993) (stating that "[it] is well documented that as domestic violence escalates, batterers often begin using weapons against their victims"). Further, studies show that the presence of a gun dramatically increases the likelihood that the domestic violence will escalate into homicide. *See* Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, Fla. B. J. 79, 79 (2005); *see also* Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. Ctr. Fam. Children & Cts. 3, 3 (2005) (discussing domestic violence homicide statistics in California, New York, and Washington). The too-familiar pattern of escalating domestic violence requires escalating

societal and law-enforcement reactions and consequences.

B. Escalating Domestic Violence Crimes Require Escalating Consequences

The escalating nature of domestic assaults by repeat domestic violence offenders demonstrates a need for escalating criminal justice consequences. A recent study on the impact of differential sentencing severity for domestic violence offenses compared to non-domestic violence offenses found that more severe sentences for domestic violence offenses resulted in fewer additional domestic violence offenses by the same offender. Andrew R. Klein et al., *Impact of Differential Sentencing Severity for Domestic Violence Offenses and All Other Offenses Over Abusers' Life Spans*, Nat'l Inst. for Justice (Sept. 2013). "[A]busers who were prosecuted and sentenced more severely for DV compared to non-DV crimes during the first years of their adult criminal careers were less likely to be arrested for subsequent new DV offenses. They had significantly fewer new DV offenses." *Id.* at 2–3.

The study's authors suggested that their research leads to the "clear" policy conclusion that "sanctions imposed for DV offenses must be more severe than that imposed on the typical non-DV offenses committed by the abusers." *Id.* at 35. By allowing federal prosecutors to charge habitual offenders with a felony, Section 117(a) provides the exact sort of tool that this research suggests reduces repeat domestic violence offenses.

C. Federal Prosecutors Need 18 U.S.C. § 117(a) to Prevent Serious Domestic Violence Crimes in Indian Country

The studies discussed above illustrate the importance of 18 U.S.C. § 117(a) as a tool for targeting habitual domestic violence offenders who pose the greatest risk of reoffending. Using Section 117(a), federal prosecutors can intervene to prevent potential future violence and escalation by offenders and to promote the safety of victims of domestic violence in Indian Country. If Section 117(a) were to be found inapplicable to prior tribal court domestic violence convictions, federal prosecutors would be deprived of an important tool to prosecute repeat domestic violence offenders, weakening the protections for domestic violence victims in Indian Country.[5]

In "Indian Country," as defined by 18 U.S.C. § 1151, federal prosecutors have jurisdiction over assaults that occur on reservations within their jurisdictions. But without Section 117(a) in place, a domestic violence assault constitutes a felony only if it results in

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[5] Other *amici* in this case have addressed the vastly disproportionate rates of domestic violence perpetrated against Native women on reservations. For example, both the National Congress of American Indians and the National Indigenous Women's Resource Center and Additional Advocacy of Organizations for Survivors of Domestic Violence and Assault address how on some reservations, the murder rate of Native women is ten times the national average. (*See* Br. of *Amicus Curiae* National Congress of American Indians; Br. of *Amicus Curiae* National Indigenous Women's Resource Center and Additional Advocacy of Organizations for Survivors of Domestic Violence and Assault.)

"substantial bodily injury" to the victim. *See* 18 U.S.C. § 113(a)(7).[6] The practical effect of the "substantial bodily injury" requirement is that much of the domestic violence that occurs on reservations is beyond the felony prosecution reach of federal prosecutors. As a result, if tribal courts lack the resources to effectively combat domestic violence or if tribal or federal misdemeanor prosecutions are insufficient to deter abuse, victims on reservations—and the Assistant United States Attorneys charged with protecting them—are left with little recourse against the offenders until the abuser eventually inflicts "substantial bodily injury" on the victim.

Section 117(a), however, gives federal prosecutors an additional tool to ensure that victims of domestic violence living on reservations are afforded similar protection against their abusers to victims who live in non-Indian Country jurisdictions. Section 117(a) makes a domestic assault committed on a reservation a felony if the perpetrator has two prior final convictions for domestic assault in a federal, state, or tribal court. *Id.* § 117(a). The inclusion of prior tribal court domestic violence convictions as possible predicates is key as it is tribal courts that adjudicate most misdemeanor domestic violence cases in reservation communities. Federal prosecutors, therefore, can use Section 117(a) to prosecute repeat domestic violence offenders whose

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[6] Although federal prosecutors have the right to charge a misdemeanor offense for assault "by striking, beating, or wounding" under 18 U.S.C. § 113(a)(4), habitual offenders subject to prosecution under Section 117(a) have, by definition, shown that misdemeanor prosecution is insufficient to deter them from committing additional domestic violence assaults.

crimes fall short of causing "substantial bodily injury" but who nonetheless have exhibited, through a record of prior tribal court domestic violence convictions, a pattern of domestic abuse. These habitual offenders are the ones whose escalating violence is most likely to end in the "substantial bodily injury," disfigurement, or even death of their victims. Federal prosecutors should not be required to sit on their hands until that happens; instead, they should be empowered to intervene on behalf of the victims. Since the passage of Section 117(a), they are so empowered.

As former federal prosecutors whose jurisdictions included Indian Country, we know the value of this authority to intervene on behalf of victims and imprison habitual perpetrators of domestic violence. For example, the North Dakota United States Attorney's Office has made active use of Section 117(a) as part of its broader strategy to address unacceptably high rates of violent crime on the reservations in North Dakota. *See generally* Timothy Q. Purdon, *The North Dakota United States Attorney's Office's Anti-Violence Strategy for Tribal Communities: Working to Make Reservations Safer Through Enforcement, Crime Prevention, and Offender Reentry Programs*, 88 N.D. L. Rev 957 (2012).

The case of *United States v. Cavanaugh*, which was prosecuted in federal district court in North Dakota and subsequently reviewed by the Eighth Circuit, provides an example of how 18 U.S.C. § 117(a) can be a critical law enforcement tool for federal prosecutors faced with repeat domestic violence offenders. In *Cavanaugh*, Section 117(a) enabled federal prosecutors to charge the defendant, who was a repeat domestic

violence offender, with a felony before he could inflict substantial bodily harm, or worse, upon his partner, thus resulting in escalating legal consequences proportionate to his escalating domestic assaults. In North Dakota, federal prosecutors brought charges under Section 117(a) against Roman Cavanaugh, Jr. *See id.* at 969–70; *see also United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). Cavanaugh was a repeat domestic violence offender, who had accumulated four prior tribal court convictions from three prior cases for domestic violence from 2005 to 2008. *Cavanaugh*, 643 F.3d at 594.

The conduct that led to Cavanaugh's federal prosecution stemmed from a fight between Cavanaugh and his common-law wife while they were traveling in a car with children. *Id.* Cavanaugh was driving, and both he and his wife were intoxicated. *Id.* Cavanaugh grabbed his wife's head, jerked it around, and slammed it into the dashboard. *Id.* He also threatened to kill her. *Id.* Cavanaugh pled guilty and was sentenced to sixty-five months in federal prison. Purdon, *supra*, at 970. If federal prosecutors had not had Section 117(a) available to allow them to charge Cavanaugh's escalating violent attacks against his intimate partners as a felony in these circumstances, using his prior tribal-court convictions as predicate domestic violence offenses, then there would have been no way for federal law enforcement to intervene until Cavanaugh had inflicted substantial bodily injury upon his common-law wife, or perhaps even killed her.[7]

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[7] Federal prosecutors in North Dakota used the same strategy to bring several other felony cases against habitual domestic violence offenders. Purdon, *supra*, at 970, 970 n.25.

The statistics on domestic violence, discussed above, suggest that the prosecutions in North Dakota under 18 U.S.C. § 117(a) prevented several domestic assaults by removing dangerous habitual offenders from reservations. Combatting repeated domestic assaults as they escalate in seriousness demands the ability to impose penalties that are similarly escalating in seriousness. The social science evidence on this issue indicates that a pattern of domestic violence is likely to end in serious injury or death of the victim. *See* Crandell et al., *supra*, at 906; Piquero et al., *supra*, at 411–18. Federal authorities can save lives and decrease violence on reservations generally by prosecuting these crimes before they reach a tragic end.

As former federal prosecutors with firsthand experience in the prosecution of domestic violence offenses in Indian Country, we recognize how Section 117(a) can help federal prosecutors protect victims of domestic violence who live on reservations by preventing habitual offenders from continuing their escalating patterns of abuse. We therefore urge the Court to preserve this tool as a necessary component of the comprehensive efforts to reduce violent crime on reservations. Our conclusion that Section 117(a) is a critical tool is no mere academic exercise; to the contrary, we have seen firsthand that whether federal prosecutors are able to prosecute habitual domestic violence offenders has very real, and potentially grave, implications for the safety of Native women living in Indian Country.

CONCLUSION

In order to preserve 18 U.S.C. § 117(a) as the critical law enforcement tool for prosecuting habitual domestic violence offenders, the former United States Attorney *amici curiae* urge the Court to reverse the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA., PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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Interest of the *Amicus Curiae*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERA has two Native American board members who live within reservation boundaries with their families. All of CERA's members understand that a Native American living in Indian country has no constitutional rights.

CERF submits this *amicus curiae* brief to add the perspective of its members that the Constitution should apply to all persons in the United States and to all lands within the exterior boundaries of the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. This case addresses whether Mr. Bryant has any due process or 6th Amendment rights. It is the categorization of the lands as Indian country that removes them not only from state jurisdiction but from the application of the Constitution of the United States.

Both parties have consented by letter to the filing of this *amicus curiae* brief.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Summary of the Argument

This brief will explain how it is the decisions of this Court that have deprived defendant Bryant of all of his constitutional rights. This *amicus* will not address specifically the 6th Amendment concerns so ably handled in the Response Brief. CERF believes its role is to present the broader picture as to why Mr. Michael Bryant, Jr. is not protected by the Bill of Rights and the Fourteenth Amendment or any other parts of the Constitution as a citizen of the United States. It begins with a basic historical summary of how the early United States modified the European Doctrine of Discovery and made Native Americans eligible for full citizenship. It then explains how the Native Americans were crossed into the slavery debate with *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and then kept in this status under the federal Indian policy of 1871.

The second section of this brief will analyze the opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and why the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301-1303, was found to be unenforceable. The brief will then suggest how *Santa Clara Pueblo* was correct in finding that the ICRA was not intended by Congress to create any actual rights in individual Native Americans. It will then demonstrate how the unlimited territorial power unleashed in the *Scott v. Sandford* decision has current application in law by proving how Richard Nixon used the *Dred Scott* opinion in specific legislation in 1966 to deliberately contradict specific constitutional structural safeguards. It will then explain how *Santa Clara* can be distinguished to guarantee individual constitutional rights to all Native Americans no matter where they live.

The final section of this brief will discuss how this Court can enforce a decision guaranteeing due process rights to all individual Native Americans. This includes confronting how Congress cannot retain plenary power over the Indians under any form of classification in the 21st century. It is long past time to make all people of the United States equal before the law.

ARGUMENT

Because this Court has managed to preserve the rationale of the worst case ever decided by it in federal Indian law for more than150 years, *amicus* CERF apologizes in advance for the blunt language contained in this brief. CERF has been consistently making many of these legal points for 20 years now trying to get this Court to restore its own position as the ultimate interpreter of the Constitution of the United States and protector of individual rights. Only if this Court reasserts its position can it protect the constitutional rights of all Americans from the unlimited power of government as has been allowed to happen against all Native Americans still residing on Indian reservations.

I. THE HISTORY OF FEDERAL INDIAN POLICY IS REALLY THE HISTORY OF TWO CONTRADICTORY POLICIES THAT HAVE NEVER BEEN RECONCILED

The assimilation policy of the young United States and the Indian policy of 1871 are two completely separate and contradictory policies. They are not compatible in any conceivable way. Justice Thomas in his concurring opinion in *United States v. Lara*, 541

U.S. 193 (2004) called federal Indian policy schizophrenic because the original assimilation policy and the Indian war policy of 1871 are contradictory. *Id.* at 219. Justice Thomas could not have been more right. Even more disturbing is that what we consider modern federal Indian policy dating from the adoption of the Indian Reorganization Act of 1934 was really a continuation and expansion of the 1871 policy. The same is true of the self determination policy or Nixon Indian policy. This Court has wrongfully assumed that federal Indian policy was merely a policy to help the Indians and did not have a more insidious purpose to expand or preserve powers that were supposed to be extra constitutional.

a. The Doctrine of Discovery was Modified in the Young United States to Allow Native Americans to Become Full Citizens.

The main policy and purpose of the nascent United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. This was the first major change to the European doctrine of discovery. Under the harsh European doctrine any lands within or without a nation/state that were conquered became the territory of the conqueror. This war power doctrine of "might makes right" had been modified some by the British to make it less

devastating to native peoples than the same doctrine applied by Spain or the Dutch. The British doctrine of discovery was applied to expand their empire and trade. Conquered natives that were capable of becoming consumers of British goods were subjugated but not exterminated. The organized natives were allowed to remain on the conquered land at the pleasure of the British sovereign. The natives had no legal title interest in the land unless they swore fealty to the British sovereign by treaty and acquired his permission for continued occupancy. The Treaty of Paris that ended the war between Great Britain and the new United States ceded all the direct British claims of sovereignty over the Colonies and British land grants but did not resolve any claim considered to be an individual or private claim. Since the United States was using the inherited British law as the basis of its own law, the questions as to the individual claims were not going to be easily resolved. The individual claims included the remaining sovereign rights of the individual Indian tribes.

These major issues regarding how sovereignty was going to be divided were generally resolved in the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed by Congress under the new Constitution. The Organic Act of 1787 as it was called as passed under the Constitution was written to attempt to reconcile the British discovery doctrine with the new enlightened views of our experiment in self-government. *Johnson v. McIntosh*, 21 U.S. 543, 588-90 (1823). The Northwest Ordinance in Article 3 contained a written federal Indian policy designed to protect and assimilate the Native Americans. It also contained a specific provision prohibiting slavery in Article 6. Not

allowing Native Americans to be considered property of the conquering sovereign was a major difference from how the Spanish treated the natives under the doctrine of discovery. As outlined in the Northwest Ordinance it was assumed that Native Americans would assimilate and become state citizens over time.

The Northwest Ordinance contained the basic Indian policy but few details of how to legally acquire land from Native Americans and tribes. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies as to these remaining individual and private claims. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in the European discovery doctrine by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. This effectively made unenforceable any individual grants made to British officers in treaties and negated the promises made by the British to the various tribes for their fealty.

This was not a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate the removal of

any Indian tribe East of the Mississippi to the Western territories. The same statute conceded that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. *See* Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed.

In the 1820's the President began to vigorously pursue a removal policy of all Indians east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The removal policy deliberately displaced the remaining Eastern Indians from their ancestral lands to make way for European settlement. Nowhere was this more obvious than the

infamous "Trail of Tears." The young nation to progress had to displace the old and complacent sentimental views of Native Americans to their vast areas of land that to European eyes were wild and needed to be put into production. Admittedly, some of these removals were little more than deliberate stealing of the valuable Indian lands for exchanges for undeveloped lands in the Western Territories.

This early United States Indian policy was not genocide. This assimilation Indian policy encouraged Indians to be domesticated to the European ways just as immigrants from all countries were being included within the "melting pot" of all people making up the new United States. This Assimilation Indian policy was far from perfect or ideal. Those Indians who wished to retain their tribal customs and ways were removed to federal territories not yet admitted as states. This gave these removed Indians more time and another chance to domesticate themselves to become citizens of what would be new states. This Indian policy lasted into the 1850's when the issues of slavery began to dominate all issues regarding acquisition of additional federal territorial land and the admittance of new states.

Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the new land. Congress has plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). Importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction

in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

From the beginning there were skirmishes with the Indian tribes. Under the Assimilation policy of the early days of the nascent United States these skirmishes were viewed as temporary uprisings. The Seneca uprising in New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913). Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

b. The 1871 Indian Policy Was a Step Backwards Toward the European Doctrine of Discovery Placing Unlimited Authority in the National Government over Indians

The *Dred Scott* decision is most remembered for its positions on slavery. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id.* at 404, 420. In *Dred Scott*, Chief Justice Taney separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other." *Scott* at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a

> free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it." *Id.* at 403-4.

Chief Justice Taney's assumptions were utterly untrue but the majority opinion in effect brought the whole harsh European doctrine of discovery back into play. This was a complete change to the integration and assimilation policy that had been the federal Indian policy accepted by the original states and applied by the United States contained in the Northwest Ordinance. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State before the Constitution was in effect. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005). The Eastern States integrated the Indians that remained into American society. *See generally United States ex rel. Kennedy v. Tyler*, 269 U.S. 12, 16 (1925). In the West, all of the Pueblo Indians in New Mexico were considered citizens of the Territory of New Mexico from the moment it was formed in 1848. *See United States v. Joseph*, 94 U.S. 614 (1876). Their towns or pueblos were recognized as territorial and then state

municipalities. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories was unlimited by any act of Congress or any clause of the Constitution by declaring the Northwest Ordinance and Property Clause inapplicable to any territory acquired after the Northwest Territory in the *Dred Scott* decision. *Id.* at 432, 442. Chief Justice Taney actually changed the definition of "sovereign people" from applying to all natural persons into a political classification determined by the Congress. *Id.* at 404. This change was intended to prevent Negro people as a race from ever being included within the definition of "sovereign people" or citizen. By including the Indians as a race of people capable of being domesticated but still in a state of tutelage the Chief Justice turned the protective Indian trust relationship of the Marshall trilogy into a potential unlimited federal weapon.

All the Executive branch has to do is reclassify an area as "Indian country" or change the status of a group of persons to "Indians" to apply the separate unlimited territorial power unleashed in the *Dred Scott* decision. *See Holden v. Joy*, 112 U.S. 94 (1872). Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign people. For purposes of Mr. Bryant's case the most important point here is that the first holding of *Dred Scott* was that any non-white person was not able to sue in a court of the United

States. *Id.* at 427. To this day the United States Supreme Court has abided by the *Dred Scott* ruling and never granted a Native American individual the right to be treated equally as a citizen of the United States in any court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978).

The slavery holdings of *Dred Scott* were mostly overruled by the 13th Amendment. The separate racial classification of "Indian" was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The Congress and the federal agencies considered that the changes made to stop making treaties with the Indian tribes and to transfer the primary responsibility over the Indian tribes from the Department of State to the Department of the Interior in 1871 ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 rejects the idea that Indians can ever become productive citizens of the United States in complete opposition to the

earlier assimilation policy. In the Revised Statutes setting the Indian Policy of 1871 are numerous statutes defining different types of Indian country. These definitions were not designed to protect the Indians from non-Indians trespassing or encroaching on lands reserved to them as the Indian country statute of June 30, 1834 was drafted. 4 Stat. 729, *See also Bates v. Clark*, 95 U.S. 204 (1877). The Indian country sections in the later Revised Statutes were done to allow the Indians and Indian tribes to be suppressed by military action on the reservation or if they left the reservations. *See generally Dick v. U.S.*, 208 U.S. 340, 352 (1908). With the 1871 Indian policy, numerous amendments to the term Indian country appeared. Most were new Indian criminal statutes.

The vilification of the Dawes General Allotment Act of 1887 done by the promoters of the Indian Reorganization Act (IRA) of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., more than proves that John Collier and company relied on the Indian Policy of 1871 for their authority to restore tribal sovereignty. This did not change with the self determination era. The IRA brought the Indian Policy of 1871 and the *Dred Scott* rulings back into federal domestic law reinvigorating this Court's old rulings in *United States v. Kagama*, 118 U.S. 375 (1886), *Elk v. Wilkins*, 112 U.S. 94 (1884) and *Talton v. Mayes*, 163 U.S. 376 (1898).

II. WILL THIS COURT EVER TREAT INDIVIDUAL NATIVE AMERICANS AS CITIZENS OF THE UNITED STATES ENTITLED TO EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES?

This Court has allowed the individual Indian to be denied all constitutional rights and still does not seem to realize that this status derives not from anything the Congress or Executive branch have done but derives from the simple fact that the Courts of the United States have since the *Dred Scott* decision denied all individual Native Americans the citizenship status of having the right to sue and pursue their constitutional rights in the courts of the United States. This is particularly heinous in this case because of how the United States spends pages in their opening brief recounting the specific provisions of the Indian Civil Rights Act that supposedly give Mr. Bryant due process protections under the law. U.S. Opening brief at 50-54. Civil rights are only real when they can be enforced in a court of law. Otherwise, no matter how wonderful the language or the rights conferred they mean absolutely nothing. This Court again applied the *Dred Scott* ruling in *Santa Clara Pueblo v. Martinez* by upholding and applying the rationale of *Elk v. Wilkins*, 112 U.S. 94 (1884) that Mrs. Martinez had no right to sue as a citizen of the United States in a federal court to challenge how the laws or actions of an entity recognized and funded by the United States was treating her. *Santa Clara* at 71.

A. The Court in *Santa Clara Pueblo* Was Correct that Congress Did Not Intend the Indian Civil Rights Act to Create Any Enforceable Rights in Individual Native Americans

While the second part of this section will take this Court to task over its decision in *Santa Clara Pueblo* the same is not true for the holding of this Court that the ICRA was not intended by Congress to confer any enforceable individual right to sue on Native Americans. Congress when it passed the ICRA had already passed the major act presented by Richard Nixon to President Johnson and championed by Senator Robert Kennedy to change the structure of our government to take full advantage of the Indian status and use of the territorial war powers in Public Law 89-554, 89th Congress, Sess. 2, 80 Stat. 378-663, Sep. 6, 1966, "To Enact Title 5, United States Code, Government Organization and Employees, codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees." This law contains 43 U.S.C. § 1457 that was directly copied from 1 Rev. Stat. § 441, the first provision of the codified Indian policy of 1871.

Each Justice of this Court should take a look at this act of Congress just to see how cleverly written it is to undo the main constitutional structural safeguards of checks and balances and separation of powers. The law uses the Indian status and the unlimited territorial power to equate the authority of the United States over states as the same as its authority over territories. This same formula is applied repeatedly to change in every section of the law what had been considered

distinctions between state and federal authority. It is not surprising that Justice Rehnquist tried to confront this very law and its next extension in 1974 by applying principles of federalism in *National League of Cities v. Usery*, 426 U.S. 833 (1976) without success. General principles of constitutional law were no match for this extra constitutional territorial war power authority that had been deliberately preserved following the Civil War. Richard Nixon had a goal and a plan to forever change our government by using the status of the Indians and he succeeded in getting this into law before he became President.

It makes sense that a limited Indian civil rights act was being discussed at the same time that the bigger deal between the Republican and Democratic parties was being executed in 1966 just as this Court reports in *Santa Clara*. *Id.* at 56. The potential flaw in the Nixon plan was for the Native Americans to actually gain full individual rights as citizens. It was imperative that Congress, the Executive branch and this Court accepted and processed Native American rights as collective tribal rights that could not be individualized. Passage of the ICRA did this well. If the Native Americans lost their special status then Nixon's whole plan could be undone because the justification for the separate and unlimited territorial power created in the *Dred Scott* decision would be contradicted.

Justice Marshall correctly decided with an almost total majority of the Court that the ICRA was not intended to create any new rights or causes of action for individual Native Americans in *Santa Clara Pueblo*. Then citing *Elk v. Wilkins* that is entirely based on *Dred Scott* they again denied a Native American any and all individual rights as a citizen. *Santa Clara* at 71.

b. *Santa Clara Pueblo* Should be Distinguished to Allow all Native Americans Rights to Due Process of Law in the Federal Courts

It is time for this Court to step up and stop discriminating against Native Americans and grant all individual Native Americans the same constitutional rights held by all other citizens of the United States in the federal courts. Is this Court ever going to learn that the attorneys for the United States are advocating a position for their client and are not neutrally representing the people? The more power the federal government gets the more it wants. This has resulted in a virtual total breakdown of the functioning of the Congress and Executive branches. People are angry and frustrated because the rule of law does not apply to the federal government. The elected branches have foolishly and greedily held on to the extra constitutional powers to expand the reach of the federal government. Both political parties are to blame for this reality.

This Court has allowed the elected branches to portray "Indians" in the 21st century as still more tribal than as citizens of the United States. In the days of mass media and the internet nothing could be more ridiculous. There is no question that Indians living on reservations are terrified of the unlimited powers exercised by their tribal governments and the Bureau of Indian Affairs officials over them. Individual Indians will not speak out because they have no protection for exercising free speech. Tribal courts which were cited in *Santa Clara Pueblo* as protectors of individual Indian rights are in actuality the very worst offenders. Not only have tribal courts utterly failed to enforce any of the provisions of the ICRA they have become completely political entities controlled by tribal

governments. Even the courts of the Navajo Nation which were once touted as the flagship tribal courts are so completely broken down and politicized that multiple court orders contradicting each other usually exist in any case today. Congress has not protected the Native Americans they have used them just as Chief Justice Taney did in 1857.

The Rehnquist Court showed a real interest in preserving and restoring aspects of the doctrine of federalism to limit ever expanding federal authority against the rights of individuals. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997). The Rehnquist Court also acknowledged that restoring tribal interests in mostly non-Indian areas upsets the "justifiable expectations" of the property owners and citizens of that area. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The Rehnquist Court tried for many years to introduce due process and equal protection limitations in federal Indian law without success. See *Duro v. Reina*, 495 U.S. 676 (1990) and *Rice v. Cayetano*, 528 U.S. 495 (2000). The Roberts Court has done nothing but allow the situation to get worse again.

The whole reason for the creation of the Supreme Court as the third branch of government was to allow judicial review to enforce the rule of law against the elected branches. Without a Supreme Court there was no way to protect individual rights from both the state and federal government's overstepping of constitutional bounds. Without the enforcement of the rule of law the Constitution is just an old document that has nothing to do with the authority asserted by the federal government today.

As long as this Court countenances real invidious racial discrimination by the United States against all

Native Americans as it has done since 1857, there is no hope or rule of law. This *amicus* is very frustrated in continually having to explain to the Native Americans who contact the organization for help that there is no path that guarantees a Native American any due process of law or protection for speaking out. We carefully explain that the risk they are taking is very real because we have seen tribal members seriously harmed by trying to make a difference. This is the reality of this Court continuing to deny any and all rights to Native Americans.

This Court has done more to protect the constitutional rights of accused terrorists as it did in *Hamdan v. Rumsfeld*, 585 U.S. 557 (2006) than it has to protect any Native American born and raised in this nation. In *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) this Court did not accept the declaration of the military and the Executive that the Guantanamo Bay Naval Station was separate "territory" not under the direct control of the United States. This holding allowed this Court to determine whether the prisoner (and all other prisoners) accused of terrorism held at the Naval Station by officials of the United States was entitled to the protections of the Constitution of the United States. How is it possible that this Court continues to deny this same judicial review to Native Americans?

This Court stepped up and protected the rights of a little girl being subjected to the Indian Child Welfare Act and was greatly praised for its decision. Even Congress and the Executive had little to say in opposition. This Court is at its strongest when it protects the civil rights and civil liberties of the people of the United States. This Court should distinguish *Santa Clara Pueblo* and state that Mr. Bryant is a full citizen of the United States entitled to all of the rights

conferred by the Constitution and Bill of Rights. As part of this ruling the Court must end the racially derogatory classification of Indian country and find that all citizens within the borders of the United States are subject to the Constitution and its amendments. All this Court is doing is giving to individual Native Americans the same rights as any other citizen. This allows Congress to be the first to sort out the implications of what it means for Native Americans to have constitutional rights.

III. THIS COURT CAN ENFORCE A DECISION CONFERRING CONSTITUTIONAL RIGHTS ON THIS INDIVIDUAL NATIVE AMERICAN

This Court cannot fix the numerous acts of Congress or the actions of the Executive Branch that treat Native Americans as less than citizens. But this Court as discussed above can itself stop treating them as less than citizens by conferring on Mr. Bryant the full rights of a citizen of the United States entitled to all constitutional and Bill of Rights protections. All CERA/CERF is proposing is for this Court to itself stop discriminating and declare that Mr. Bryant is a citizen of the United States entitled to due process of law in all courts of the United States. This Court does not need to change any federal statute to do this. All it has to do is reverse or correct its own legal precedents.

The reason this decision would be completely enforceable is that there is no way for the Congress or Executive to pass a law to overrule it. This is a constitutional ruling and as such is not subject to being overridden by Congress. That said the political reality of Congress and or the Executive actually passing a law to put the Native Americans back into a state of

pupilage and make them less than full citizens again would be very interesting to see. Neither Congress or the Executive Branch can openly write a law that would claim to deprive Native Americans of their constitutional rights without setting off a major debate and bringing all of the issues regarding how the tribal status has been maintained into the open. Once it is revealed that the Indians were kept in this status because of the *Dred Scott* decision the debate would be over.

This debate needs to happen to resolve the problems that *Dred Scott* created with the territorial war powers. Changing federal Indian policy will allow the restoration of the application of the Property Clause to all territories of the United States. Congress was only supposed to have plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories became States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). This was the very requirement altered in *Dred Scott* by finding that the Property Clause and Northwest Ordinance only applied to the Northwest Territory. *Scott* at 442. The plenary power over Indians has been used to create plenary power over the States and all individuals. The only way to correct this is for this Court to step up and end the racial discrimination against individual Native Americans and finally give people like Michael Bryant, Jr. the same due process rights as all other Americans.

Conclusion

This Court should uphold the decision of the Ninth Circuit Court of Appeals and agree that even though Michael Bryant, Jr. is a Native American he has

the same constitutional due process rights as any other citizen of the United States.

Respectfully submitted,

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No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL BRYANT, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSOR BARBARA L. CREEL AND THE TRIBAL DEFENDER NETWORK IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The Tribal Defenders Network is a group of tribal advocates, defense attorneys, and federal criminal justice attorneys who defend American Indians in tribal court criminal proceedings, and who collaborate generally with tribal court criminal defense attorneys and advocates. These *amici* are concerned about the rights of defendants who are American Indians appearing in tribal court criminal proceedings, including their due process rights in the tribal court setting and in successive federal court criminal prosecutions.

Professor Barbara L. Creel is an enrolled citizen of a Federally Recognized Indian Tribe, and a former Assistant Federal Public Defender, tribal defender, and state appellate defender. She has practiced in Oregon and New Mexico as an Indian Legal Services Attorney and an Assistant Federal Public Defender. She is a tenured Professor of Law at the University of New Mexico School of Law, and her area of expertise is the intersection of criminal law, Indian law and constitutional law. She teaches courses addressing criminal law and procedure, including Criminal Law in Indian Country. She is the Director of the Southwest Indian Law Clinic, where she supervises law students who represent Indians in tribal court criminal proceedings. She has appeared before

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1. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

numerous tribal courts, including the Hopi Criminal Court, the Pueblo of Tesuque Tribal Court, the Pueblo of Laguna Tribal Court, the Pueblo of Taos Tribal Court, and the Tribal Court of the Confederated Tribes of Warm Springs. She has represented many Indian defendants in federal habeas court review of tribal court proceedings pursuant to under 25 U.S.C. § 1303, and has argued before the Court of Appeals for the Ninth and Tenth Circuits.

Amici are concerned about the civil rights and liberty interests of American Indians in federal court, and the harmful impact denying the right to counsel has on Indian defendants in tribal court proceedings and in subsequent federal court proceedings. Whether disposed of by plea or trial, federal prosecutions that rely on prior tribal court convictions that did not provide Indians with indigent defense counsel gravely jeopardize those Indian defendants' federal constitutional rights to due process of law.

SUMMARY OF ARGUMENT

In our American system of justice, the right to counsel is provided for all defendants when life or liberty is in the balance, regardless of race, ethnicity, nationality, or ability to pay. Fundamental due process and this Court's precedents require that prior convictions must also include this fundamental right when offered as proof in a subsequent prosecution. A prosecutor's reliance on an Indian's prior convictions must be consistent with this guarantee to reflect the nation's constitutional values within the adversarial system.

The new statutory scheme specifically designed to combat domestic violence in Indian country reaffirms tribal criminal jurisdiction over non-Indians, but also guarantees that non-Indians have greater rights to due process and representation by counsel than do Indians charged with the same crimes and facing the same terms of incarceration. Indeed, while non-Indian defendants who will be charged with domestic violence in tribal court are required to have access to the full panoply of rights afforded to defendants outside of tribal courts, Indian defendants may be convicted or led to plead guilty to charges of domestic violence without the benefit of any appointed counsel. Compounding this unequal scheme is the United States' use of these infirm convictions in federal court against the Indian in the name of deference to tribal sovereignty and the federal Indian trust responsibility.

To single out and exclude the Indian defendant from the fundamental protections celebrated by this Court's constitutional jurisprudence is contrary and offensive to our most basic notions of justice. This constitutional injury to Indian people is especially grave in light of the fact that statistically, non-Indians are far more likely to be the perpetrators of violence against Indian women than are other Indians, and this was the primary problem Congress sought to address.

Using uncounseled tribal court convictions in this way also gravely distorts the deference to tribal sovereignty that must be afforded by the United States, and contravenes the federal trust responsibility to tribes and Indian people. Out of respect for tribal sovereignty and the financial challenges tribes face in reclaiming their justice systems in an era of self-determination, Congress

has not yet required tribes to pay for counsel for every indigent defendant. That was one of the concessions made in the Indian Civil Rights Act.

However, to exploit the absence of such a right to counsel in a way that renders Indian people—and *only* Indian people—susceptible to federal prosecution and incarceration without the advantage of counsel, thereby removing them from their families and communities, harms Indians and undermines the collective sovereignty of tribes. Neither the plenary power doctrine nor the federal trust responsibility bestows authority on the United States to do that; and there is no real merit in the position that protecting the safety of Indian women requires exacting such an unfair toll on the constitutional rights of other Indian people. Both the safety and well-being of women and the basic civil rights of all Native people within Indian communities can and must be protected.

Instead of condoning the denigration of Indian civil rights in federal court, this Court has the opportunity in this case to extend the protection for individual rights afforded by the Constitution, so that *all* persons who face incarceration, including in tribal court proceedings, have the right to counsel and full due process. Alternatively, this Court must, at the very least, protect Indian people from the grave disparity presented in this litigation by holding that tribal court convictions of Indians obtained without the right to counsel cannot be used as an element in a federal court prosecution.

ARGUMENT

I. Reliance on Prior Uncounseled Tribal Court Convictions to Prove an Element of the Offense Under 18 U.S.C. § 117 Violates the Due Process Rights of All American Indian Women, Children and Men[2]

A. Constitutional Due Process and the Indian Civil Rights Act

All defendants in federal court prosecutions have the right to appointed counsel when life or liberty is in the balance, regardless of race, ethnicity, or nationality, and the right to prior convictions that are consistent with this principle. Allowing prior uncounseled tribal court convictions to serve as proof of an element of an offense in federal domestic violence prosecutions violates the statutory and constitutional due process rights of American Indians. Whether this Court should allow reliance on such convictions requires consideration of the United States Constitution and its application to American Indians in *federal* court proceedings. While an Indian is not constitutionally protected in a *tribal* criminal prosecution, she *is* protected in a *federal* court prosecution. Although her citizenship is not relevant to trigger the full panoply of constitutional protections, she in fact *is* a United States citizen, and as such, she is entitled to all constitutional protections when charged with any crime in federal court.

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2. Allowing prosecutors to credit prior uncounseled tribal court convictions against Indians will have wide repercussions and potentially impact American Indian women and men in federal court proceedings, as well as juveniles who are also subject to federal court jurisdiction under the Major Crimes Act.

The Constitution establishes the Indian defendant's rights in a federal court prosecution, just as it guarantees these fundamental rights to *all* U.S. citizens. In particular, the Constitution guarantees federal criminal defendants the right to assistance of counsel for their defense. U.S. Const. Amend. VI. Although there is no Sixth Amendment right to counsel in tribal court, see *Talton v. Mayes*, 163 U.S. 376 (1896), constitutional due process and the Indian Civil Rights Act (ICRA) together ensure that Indians and non-Indians alike enjoy the right to due process of law in *both* tribal court *and* federal court. U.S. Const. Amend. V; 25 U.S.C. § 1302 ("No Indian Tribe shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .").

The United States argues that the absence a right to appointed counsel in *tribal* court proceedings, consistent with the statutory provisions of ICRA, in effect strips Indians of that right in *federal* court prosecutions. Under this view, "valid" convictions under ICRA subject the Indian to a domestic violence prosecution without protections deemed necessary to meet fundamental fairness.

This argument misapprehends both Congress's intent in passing ICRA and the inalienability of the federal constitutional right to counsel that protects Indians and non-Indians alike when charged with federal crimes in federal court. *Amici* urge this Court to reject the United States' argument and protect the due process rights of all American Indians facing prosecution in federal court. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev.

431, 478 (2005) ("If the two primary rights 'missing' from ICRA—free representation for indigent defendants and a jury that includes nonmembers—need to be extended to somehow save the tribal criminal justice scheme, the [federal] courts could interpret ICRA's due process clause to require both.").

B. Fundamental Fairness and the Right to Counsel for All When Facing Incarceration

In a commanding line of cases, this Court has defined the right to counsel as fundamental to justice and fairness and thus inextricably intertwined with due process. While the Constitution guarantees a fair trial through the Due Process Clauses, the basic elements of a fair trial in a criminal proceeding are deployed through access to counsel:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI. Thus, a fair trial is one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of elements or issues defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards

are essential to criminal justice, and the right to counsel is the paramount safeguard. *See e.g., Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942).

In federal and state criminal courts, counsel must be provided for all defendants unable to retain counsel when life or liberty is in the balance, regardless of race, ethnicity, or nationality, unless the right is competently and intelligently waived. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). Counsel's presence is essential because attorneys are the means through which all other rights of a person on trial are secured. *United States v. Cronic*, 466 U.S. 648, 653 (1984).

In an oft-quoted passage, this Court has recognized that without counsel in a criminal matter, the right to be heard would be utterly meaningless:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 68-69 (1932). Involvement of competent counsel is so central and basic to justice in our system that an arbitrary denial of counsel is tantamount to "a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id. at 69.* This Court's view in *Powell* of the indispensability of counsel in criminal proceedings took on enormous and lasting meaning.

Shortly after deciding *Powell*, this Court in *Johnson v. Zerbst* described the right to counsel as "necessary to insure fundamental human rights of life and liberty," and the right to counsel guarantee as "one of the essential barriers against arbitrary or unjust deprivation of human rights." 304 U.S. at 462; *see also Smith v. O'Grady*, 312 U.S. 329 (1941); *Avery v. Alabama*, 308 U.S. 444 (1940). *Johnson v. Zerbst* thus directs that the Sixth Amendment not only guarantees the criminal defendant a right to retain counsel in federal court, but requires the government to appoint an attorney for the defendant who cannot afford one in order to protect her when facing a government with the power to take her life or liberty:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done. It embodies a realistic recognition of the

> obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to the humane policy of the modern criminal law which now provides that a defendant if he be poor, may have counsel furnished him by the state, not infrequently more able than the attorney for the state.

304 U.S. at 463.

In *Gideon v. Wainwright*, this Court announced a new constitutional rule, extending the right to court-appointed counsel to state criminal prosecutions for felony charges, an extension this Court characterized as structurally indispensable to a fair trial:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national

> constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

372 U.S. at 344. The appointment of counsel for an indigent criminal defendant is "a fundamental right, essential to a fair trial," and the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires it in federal court. *Id.* at 342-44 (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). *Gideon* thus affirms that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

Nine years after *Gideon*, this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extended the right to court-appointed counsel to all persons, including Native Americans, facing the possibility of imprisonment in state or federal court. Following *Argersinger*, no person could be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless she had the assistance of counsel at trial. *See id.* at 37; *Gideon*, 372 U.S. 335. Importantly, the Indian Civil Rights Act was enacted four years *before* this Court's decision in *Argersinger*. Thus, at the time of enactment, ICRA reflected Congress's understanding of the minimum protections required by the Sixth and Fourteenth Amendments in state court proceedings in 1968, prior to *Argersinger*'s mandate. When enacting ICRA, Congress ensured that the right to counsel in tribal court proceedings was synchronous with the protections then required in state court proceedings.

The Sixth Amendment right to counsel serves as a constitutional minimum in all state and federal criminal proceedings that may result in a sentence of actual imprisonment. Tribal courts comprise the only judicial forum in the United States where the constitutional right to counsel does not exist for a United States citizen facing incarceration.[3] The lack of appointed counsel and the imposition of a sentence of actual imprisonment render the Indian defendant's convictions constitutionally invalid. It follows that introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violates a defendant's right to counsel and due process. Any evidence of a prior conviction that the Government intends to use to "support guilt or enhance punishment for another offense" in a criminal proceeding must comport with the protections that the United States Constitution affords to *all*—citizens and non-citizens, Indians and non-Indians alike. *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967); *see also id.* at 115 ("The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial. . . .").

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3. Indian Tribes do have to provide counsel at the tribe's expenses when imposing a sentence greater than one year and up to nine years. *See* 25 U.S.C. § 1302(c) (detailing the requirements imposed for enhanced sentencing under the 2010 Tribal Law and Order Act amendments to ICRA).

II. Reliance on Uncounseled Tribal Court Convictions Detrimentally Impacts Only Native American Defendants, Violating Indian People's Constitutional Right to Equal Protection

Because of the uneven legal landscape and woeful jurisdictional gaps, only American Indians show up in federal court with prior uncounseled convictions that do not comport with constitutional due process. This calamity is one created by Congress and this Court's jurisprudence. Under the Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (2006)), federal courts exercise criminal jurisdiction over American Indians, yet significant gaps exist respecting jurisdiction over non-Indians committing serious domestic assault against Indians on the reservation. When Congress passed the Indian Civil Rights Act in 1968, tribes retained their inherent jurisdiction over all criminal offenders, but were limited by ICRA to sentencing authority equivalent to a misdemeanor in state or federal court. *See* 25 U.S.C. §§ 1301–1303. Moreover, in 1978 this Court in *Oliphant v. Suquamish Indian* Tribe, 435 U.S. 191 (1978), divested tribes of any jurisdiction to try and punish non-Indians.[4]

Twelve years later, this Court prohibited tribal criminal jurisdiction over nonmember Indians in *Duro v. Reina*, based on concerns about the civil rights of those citizens. 495 U.S. 676 (1990), *rev'd by statute*, 25

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4. The *Oliphant* decision has been roundly criticized as judicial fiat and as "flatly wrong." Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 457 (2005); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.02[3][b], at 228-30 (Nell Jessup Newton et al. eds., 2012) [hereinafter "COHEN'S HANDBOOK"] (collecting scholars' criticisms).

U.S.C. § 1301(2)(1990). Congress acted swiftly to overrule *Duro*, enacting a statute that "recognized and affirmed" inherent tribal criminal jurisdiction over all Indians. 25 U.S.C. § 1301(2)(1990). Although Congress moved quickly to implement the "*Duro* fix," it did not attempt to address the gap in jurisdiction over non-Indians left by *Oliphant*. Consequently, tribes were left with limited inherent criminal jurisdiction over their own Indian membership as well as members of other tribes; but a jurisdictional void remained in which non-Indians were totally immune from tribal court prosecution. That immunity marred the jurisdictional landscape until Congress acted in 2013 to restore tribal jurisdiction over non-Indians—but only in domestic violence cases, and contingent on tribes' providing certain protections comparable to rights guaranteed by the United States Constitution. *See* Violence Against Women Act 2013, 127 Stat. 120-23, § 904 (codified at 25 U.S.C. § 1304).

Section 904 of the 2013 Act—the Violence Against Women Act Reauthorization, Pub. L. No. 113-4, 127 Stat. 54 (codified throughout the United States Code) [hereinafter "VAWA 2013]—contains the Indian country provisions which allow tribal prosecution of non-Indians accused of dating violence and domestic abuse. VAWA 2013 represents the first congressional response addressing this Court's denial of tribal court jurisdiction in *Oliphant*. VAWA 2013 recognizes and affirms "special domestic violence criminal jurisdiction" over non-Indians, as part of the inherent jurisdiction of Indian tribes defined in the Indian Civil Rights Act. 25 U.S.C. § 1304(b)(1). Because of VAWA 2013, tribal courts exercising this inherent power have jurisdiction over non-Indian defendants for acts of domestic violence or dating violence that occur in the Indian country of the tribe, but with certain proscriptions.

See 25 U.S.C. § 1304 ("Tribal Jurisdiction Over Domestic Violence").

And herein lies the problem.

Tribes that exercise section 904 jurisdiction must provide non- Indian defendants with the full panoply of constitutional rights as established by the U.S. Constitution and interpreted by this Court, in addition to the ICRA statutory rights. *See* 25 U.S.C. § 1304(d)(1)-(4). Specifically, tribes must provide: (1) "all applicable individual rights guaranteed under [ICRA]"; (2) the right to counsel; (2) an impartial jury which "reflects a fair cross section of the community" and does not "systematically exclude" non-Indians; (3) "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm inherent power [of tribal courts] . . . to exercise" this jurisdiction; and (4) for offenses punishable by imprisonment, all rights described in 25 U.S.C. § 1302(c).

Accordingly, Indian tribes can only prosecute other Indians, and under ICRA, Indians do not have the right to indigent defense counsel. The only exception is the handful of tribes that are exercising the special domestic violence criminal jurisdiction over non-Indians authorized by VAWA 2013, which requires the full panoply of U.S. Constitutional rights. The result is that Indians do not have the right to indigent defense counsel in tribal court,[5] but non-Indians do.[6]

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5. Indians only have the right to indigent defense when facing a sentence longer than a year. *See* 25 U.S.C. § 1304.

6. This is especially troubling given the statistics regarding the number of non-Indians perpetrating violence against Indian women.

Tribal court defendants routinely receive and serve sentences of incarceration without counsel. *See, e.g., United States v. Kirkaldie*, 21 F. Supp. 3d 1100, 1108-09 (D. Mont. 2014) (observing that Indian defendant "served a sentence of actual imprisonment in the tribal court" and that the "Government concedes that [defendant] failed to receive appointed counsel in tribal court"); *Romero v. Goodrich*, 480 F.App'x 489 (10th Cir. 2012) (challenging an underlying tribal court order of imprisonment for eight years without counsel). Thus, in a subsequent federal prosecution, only a Native American defendant will have suffered a prior conviction that would have violated the Constitution and transgressed access to justice principles applicable in federal court. With respect to Respondent Bryant, and in most tribal court convictions, the usual justifications for properly crediting an uncounseled conviction—such as the sentence having consisted of a fine only, or an intelligent waiver having been obtained, or the defendant's ability to afford counsel—do not apply. In fact, in *Amici*'s experience defendants in tribal court routinely plead guilty to minor offenses and receive sentences of incarceration without nderstanding their

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See Ronet Bachman et al., U.S. Dep't of Justice, Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known 141 (2008), *available at*: https:// www.ncjrs. gov/pdffiles1/nij/grants/223691.pdf. ("Victimizations against American Indian and Alaska Native women were more likely to interracial. That is, a larger percent of victimizations against American Indian and Alaska Native women are committed by white offenders compared to American Indian and Alaska Native offenders.") *see also Id.* at 38, Table 9. In addition, the report noted that 60% of Alaska Native and American Indian women resided off tribal lands in urban areas. *Id.* at 6, 17.

rights or the collateral consequences of a conviction with jail time imposed.[7] Nor is there merit in the argument

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7. *See* Statement of Neil Fulton, Chief Federal Public Defender for the Districts of North and South Dakota Before the Senate Judiciary Committee on Protecting the Constitutional Rights to Counsel of Indigents Charged with Misdemeanors, May 13, 2015. Mr. Fuller testified:

"Entering guilty pleas to get out of tribal custody is a disturbing and recurring reality that encounter. Many tribes do not provide counsel and many that allow counsel permit lay advocates rather than law trained ones. When a defendant requests counsel, they often face the reality that due to case backlogs, the lack of readily available counsel given sparse populations, and other practical impediments they will remain in jail longer to obtain counsel and fight a charge than if they simply pleaded guilty and got a sentence of time served. In my experience that is common. In fact, I have spoken with advocates who have dealt with the conflict of advising clients who may want to assert their innocence and use counsel, but would face extended detention to do so and simply plead guilty as a result of not understanding how those admissions may be harmful in the future.

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"I also frequently see prosecution for domestic assault by an habitual offender under 18 U.S.C. Section 117 based on tribal misdemeanor assault convictions that are obtained without counsel. While there are clearly many instances of real and troubling domestic abuse in Indian Country and elsewhere, there are also many instances where conduct that would more accurately be described as public intoxication or disorderly conduct results in a guilty plea to domestic violence in tribal court without counsel. Later, those uncounseled tribal court convictions provide the foundation for federal prosecution and enhanced penalties."

Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the Senate Comm. On the Judiciary, 114th Cong. (2015)(statement of Neil Fulton, Chief

that Congress's intent to accommodate tribal sovereignty by not requiring defense counsel at the tribe's expense licenses disregard or suspension of the Constitution's protections when the Indian defendant is haled into *federal* court. Although this Court has held that the Constitution's due process safeguards against governmental power do not apply of their own force to tribal governments, *Talton v. Mayes*, 163 U.S. 376 (1896), the power of the *federal* government is not likewise exempt and remains constitutionally limited. This Court must not sanction the racially offensive notion that the Constitution does not fully protect a criminal defendant in federal court when she happens to be an Indian whose tribal enrollment status had allowed her to be convicted previously in tribal court without benefit of counsel.

While it is true that the Sixth Amendment does not operate to require counsel in tribal court, it does not follow that convictions secured without counsel and adequate civil rights protections are sovereign tribal decisions to be credited in federal court at the expense of the individual Indian defendant. There are myriad reasons for a tribe's decision not to provide law-trained counsel in tribal court proceedings, including the all-too-common lack of financial resources, training, and personnel to support a tribal public defense system on an impoverished Indian reservation. Those reasons do not alter the fact (or soften the harsh reality) that the prior convictions were secured without protections this Court repeatedly has deemed

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Federal Public Defender for the Districts of North and South Dakota), available at http://www.judiciary.senate.gov/meetings/protecting-the-constitutional-right-to-counsel-for-indigents-charged-with-misdemeanors.

necessary to provide basic fairness in federal court proceedings. There are also myriad reasons that a tribal judge would routinely impose a jail sentence for minor offenses on the reservation, including lack of alternatives to incarceration, recidivism and probation violations for substance abuse, and limited access to treat substance abuse on the reservation.

Even assuming that congressional plenary power over Indian tribes allows Congress to create a federal offense aimed at combatting domestic violence in Indian country, crediting a prior uncounseled conviction to make it easier for the prosecutor to convict the Indian does not fall within that power. In determining whether Congress intended to permit prior *uncounseled* convictions to serve as proof of the element of the domestic violence statute, this Court's longstanding interpretive canons of construction in both Indian law and criminal law weigh heavily in favor of retaining protection of the individual Indian and her constitutional rights in federal court. *See, e.g.*, COHEN'S HANDBOOK §2.02, *supra*, at 113-23 (discussing Indian law canons). The broader, long-term danger posed by this case, of course, is that if Congress can diminish the civil rights of an Indian individual in federal court for the sole purpose of making it easier to convict, it can do so for other citizens as well.[8]

The use of prior uncounseled convictions to combat domestic violence in federal court creates an untenable

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8. "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith." Felix S. Cohen, *The Erosion of Indian Rights, 1950-53*, 62 Yale L.J. 348, 390 (1953).

and unconscionable equal protection problem for Native Americans, whose unique racial/political status targets them as the only class of United States citizens who face prosecution with priors that were secured without the fundamental fairness equated with the right to counsel.[9] Domestic violence is a plague that threatens all families and has a documented toll on Indians in Indian country. The United States has taken the position that suspending an Indian defendant's constitutionally protected rights in federal court is the only way to address domestic violence problems in Indian country. As interpreted by the United States in this case, Section 117(a) deprives a certain class of citizens—based on their race, ethnic origin, and political status—of those citizens' constitutional right to have counsel appointed to defend themselves against charges of criminal wrongdoing. The Government's effort to evade the Constitution's equal protection guarantee by arguing that tribal status constitutes a political rather than racial distinction must be rejected in the context of criminal prosecutions in federal court. The Constitution is equally available to *all* U.S. citizens—American Indians included—to defend themselves against the immense prosecutorial power of the Federal Government.

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9. This Court has held that classifications based on status as a member of a recognized Indian tribe do not violate the Equal Protection Clause. *United States v. Antelope*, 430 U.S. 641, 644–47 (1977). However, *Antelope* specifically left open the question of whether "instances in which Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense" would violate the Equal Protection Clause. *Id.* at 649 n. 11. Such a scenario is present here.

CONCLUSION

For the reasons set forth above, amici urge this Court to affirm the decision Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX — STATEMENTS OF I NTERESTS OF PARTICULAR AMICI CURIAE*

The following join as Sponsors of the Brief of Barbara Creel and the Tribal Defender Network as *Amici Curiae* in Support of Respondent:*

ANDREA SEIELSTAD

Professor Andrea M. Seielstad has 25 years of experience representing individuals in tribal court proceedings, as well as in state, federal and administrative courts of Ohio and New Mexico. She began her legal career as a staff attorney at DNA – People's Legal Services, Inc., in Crownpoint, New Mexico, providing public defender services for adults and juveniles charged with crimes by the Navajo Nation and representing individuals in a variety of civil proceedings. She has represented Native Americans in habeas actions in tribal and state court and collaborated in the representation of Indian defendants in federal habeas court review of tribal court orders pursuant to 25 U.S. C 1303. She is a tenured professor at the University of Dayton School of Law, where she teaches in and directs the school's clinical program and teaches civil procedure, civil rights enforcement, and dispute resolution. She also teaches and supervises students periodically in the University of New Mexico's Southwest Indian Law Clinic and has taught as a visiting professor in a clinical program that acted as the public defender of the Nez Perce Tribal Court at the University of Idaho School of Law. She is licensed to practice in Ohio, New Mexico, the Bishop Paiute Tribal Court, and has practiced before the Navajo Nation courts.

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* Titles and affiliations are for identification purposes only.

Appendix

Professor Seielstad is committed to protecting the civil and human rights of American Indians as well as in promoting tribal sovereignty. Based on her experience representing individuals in tribal, state, and federal court, she has experienced first-hand the importance of counsel in advising individuals about the consequences of their pleas in and outside of tribal justice systems and in securing due process and other fundamental rights.

KATHLEEN BOWMAN

Kathleen Bowman is the Director Office of Navajo Public Defender Office, a position she has held since the office was established in 1999. She manages and supervises the criminal defense services at the Window Rock office and three district offices within the Navajo Nation. As the Tribal Public Defender, she represents the defense bar in drafting and revising the Navajo Nation code – including the Children's Code, Family Violence and Protection Act, Vulnerable Adult Protection Act, Extradition Statutes, Sex Offender Registration and Notification Act, Title 17 Criminal Statutes – providing a voice and critique that is crucial to ensuring due process rights and fundamental rights are protected. She is a dedicated advocate for justice and fairness in criminal proceedings, and has spoken out on pre-trial detention abuses that cause uncounseled pleas. http://www.navajotimes.com/politics/lawcourts/2010/0410/042910defendants.php

Ms. Bowman is a member of the Tribal Defender Network.

Appendix

ELLEN PITCHER

Ellen C. Pitcher served as an Assistant Federal Public Defender in the District of Oregon for 24 years, where she was a Senior Litigator for the last decade of her service. She has represented dozens of tribal members charged with offenses in Indian Country, including murder, manslaughter, felony assault, sexual offenses and firearms charges. In this capacity, she traveled to a number of reservation lands, observed tribal court proceedings and met with tribal prosecutors, probation officers, legal aid personnel and law enforcement. Prior to her federal service, she headed criminal law practice in Hood River and Wasco counties along the Columbia River in Oregon, where she represented tribal members in state criminal proceedings. Her interest in tribal legal issues extends beyond individual cases, and she has traveled to the Confederal Tribes of the Warm Springs Indian Reservation to meet with tribal council members, provide general legal information to the local newspaper, the *Spilyay Tymoo*, and mentor the tribal advocates and legal aid attorneys representing tribal members in tribal court.

Ms. Pitcher's path to the legal profession began with her advocacy for women's rights in the 1970's, and she remains committed to the fight for women's civil rights, including their safety from domestic violence, both in Indian County and elsewhere. Her concern for tribal members includes protection of individual tribal members' fundamental constitutional rights in tribal court and in subsequent proceedings in state and federal court.

Appendix

KRISTY BARRETT

Kristy Barrett is the former Executive Director of the Native American Program of Legal Aid Society of Oregon, an organization she worked with for over 16 years, before becoming the Executive Director of Sage Legal Center, a nonprofit law firm dedicated to Indian juvenile justice. At the Native American Program, she managed a Department of Justice criminal defense contract and supervised a tribal court criminal defense services on the Warm Springs Indian Reservation and provided defense training and services to coordinated to address the gap in justice for tribal people under the Indian Civil Rights Act. The tribal public defense cases provided numerous opportunities to view the necessity of counsel and the degradation of Indian rights without it.

OFFICE OF THE TRIBAL PUBLIC DEFENDER
COLVILLE CONFEDERATED TRIBES

The Office of the Tribal Public Defender for the Colville Confederated Tribes is one of the few dedicated criminal defense offices in Indian Country. Neither the Indian Civil Rights Act nor the Colville Civil Rights Act require the tribes to pay for members to be represented, however the Colville Business Council has chosen to do so to better serve the membership. Pursuant to the tribal code, public defenders and advocates represent members in criminal cases in which defendants are facing jail. Certain Colville public defenders and advocates are members of the Tribal Defense Network.

Appendix

REINA ESTIMO

Reina Estimo is a member of the Confederated Tribes of Warm Springs, a federally recognized Indian Tribe in Oregon, and a former Tribal Public Defense Lay Advocate with the Tribes. In her position, Ms. Estimo has provided criminal defense services to hundreds of Warm Springs Tribal members in tribal court. She is concerned with the due process rights of all Indians in tribal, state and federal court proceeding, including the direct and collateral consequences of a tribal court conviction. She has witnessed the harsh reality of crime and punishment in Indian Country where indigent Indian defendants, tribal members and non-members – men, women and children – were incarcerated in the reservation jail for up to year or more without any representation. Many Indians entered a guilty plea without any legal advice from counsel or an advocate, or even information on the nature of the charges and evidence, because of the inability to post any bail on pending charges. Without the possibility of bail, defendants plead guilty to expedite the process to begin a serving sentence rather than wait several weeks or months in pre-trial detention. She has also witnessed non-member Indians plead without any advice because they are unable to retain counsel and were not entitled to the tribal defender services. Ms. Estimo was a member of the Tribal Defender Network.

JOHN P. LAVELLE

Professor LaVelle has been teaching and writing in the field of Indian law for 22 years. He is an enrolled member

of the Santee Sioux Nation and an Associate Justice of the Santee Sioux Nation Supreme Court. He served as a member of the board of authors and executive editors for the 2005 and 2012 editions of *Cohen's Handbook of Federal Indian Law*, the field's comprehensive treatise. He is a Dickason Professor Law at the University of New Mexico School of Law in Albuquerque, where he teaches courses in the Law and Indigenous Peoples Program.

No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Section 117(a) of Title 18 of the U.S. Code provides that it is a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, *or Indian tribal court* proceedings for" enumerated domestic violence offenses, including misdemeanor offenses. 18 U.S.C. § 117(a) (emphasis added).

This brief addresses the following question, which is fairly subsumed within the question on which this Court granted review:

> Despite the constitutional doubts doctrine, the rule of lenity and the Indian law canon, must 18 U.S.C. 117(a) be construed to include even *uncounseled* convictions in tribal courts?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

The ultimate question in this case is whether an American Indian's prior conviction in tribal court can be used as a predicate for a recidivism prosecution in federal court under Section 117(a) of the Violence Against Women Act when the defendant lacked any right or opportunity to request counsel in the tribal court. Under the Government's interpretation, that provision poses a substantial risk that impoverished and often illiterate Native Americans will be sent to prison for extended periods based on uncounseled convictions, even for crimes they did not actually commit: Under that interpretation, an uncounseled conviction in tribal court—even for a misdemeanor—can be used as a predicate for the substantial sentencing enhancement that Section 117(a) allows. But that interpretation contravenes one of the main purposes of the Sixth Amendment right to counsel which, as this Court repeatedly has recognized, exists in large part to reduce the risk that criminal defendants will be "railroaded" by busy prosecutors and courts into pleading guilty to crimes of which they are innocent. *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984); *Powell* v. *Alabama*, 287 U.S. 45, 52 (1932).

Amici—each described in more detail in the Appendix—are organizations and scholars focused on criminal justice. While they fully support the Act's objective of reducing violence against all women, they oppose any interpretation that would discriminate against American Indians by placing them at a substantial

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

risk of long prison sentences predicated on uncounseled tribal-court convictions, including for crimes they did not commit. Fortunately, neither the text of Section 117(a) nor the goal of reducing violence against Native American women requires that this provision be interpreted to subject impoverished American Indians to that risk.

There is, in short, a better path, one that not only guards against this risk but also avoids the need to resolve the serious constitutional issues implicated by this case. And that path is simply to construe Section 117(a)'s reference to "convictions" in tribal court as being limited to *counseled* convictions, at least where the conviction resulted in incarceration.

That approach better comports with the text and historical context of the provision–including the fact that the other "convictions" that can serve as statutory predicates for enhancement are likewise necessarily limited to counseled convictions. That approach also better comports with the rule of lenity that this Court applies to all federal criminal statutes. And that approach better comports with this Court's long-standing canon that statutes addressing American Indians should be interpreted, where fairly possible, to avoid a detrimental impact on them.

If, therefore, this Court is not fully persuaded by the Ninth Circuit's constitutional analysis—or even if it is—*amici* respectfully urge the Court to adopt this approach to construing Section 117(a). The Court should reject the Government's interpretation, which subjects disadvantaged American Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

STATEMENT

After his conditional guilty plea in the United States District Court for the District of Montana, respondent Michael Bryant, Jr. was convicted of domestic assault by a "habitual" offender, in violation of 18 U.S.C. § 117(a). Pet. App. 3a. Conviction under that provision requires "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court" 18 U.S.C. § 117(a). Bryant, a member of the Northern Cheyenne Tribe, had pleaded guilty to two or more tribal court misdemeanors for domestic assault. Pet. App. 3a.

Throughout these tribal court proceedings, Bryant did not have the benefit of counsel. Pet. App. 5a. That is because, when an Indian tribe prosecutes its own members in its tribal court, it is not governed by provisions of the Federal Constitution, such as the Sixth Amendment. As this Court has observed, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); *accord Duro* v. *Reina*, 495 U.S. 676, 693 (1990) ("the Bill of Rights does not apply to Indian tribal governments"). And, while the Indian Civil Rights Act of 1968 provides some procedural protections to Indian defendants, that statute does not provide a right to appointed counsel in tribal courts. See 25 U.S.C. §§ 1302(a)(2)–(10), 1303.

Before entering Bryant's conditional plea, the district court denied his motion to dismiss, which alleged that his indictment under Section 117(a) violated the Fifth and Sixth Amendments because it relied on his

uncounseled tribal court convictions. Pet. App. 3a; Motion to Dismiss, *United State* v. *Bryant*, Dkt. No. 11-70, Doc. 19, at 1–2 (D. Mont. Nov 7, 2011). But the United States Court of Appeals for the Ninth Circuit reversed that ruling. Pet. App. 1a–16a.

In its opinion, the Ninth Circuit recognized that respondent's uncounseled convictions were not themselves constitutionally infirm, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." Pet. App. 7a–8a. Yet, based on its reading of *Nichols* v. *United States*, 511 U.S. 738 (1994), and the Ninth Circuit's own decision in *United States* v. *Ant*, 882 F.2d 1389 (1989), the appellate court determined that, because the tribal court convictions resulted in imprisonment and had not been imposed in a proceeding that "guarantee[d] a right to counsel that is, at minimum, coextensive with the Sixth Amendment right," the uncounseled convictions could not be relied upon to fulfill Section 117(a)'s predicate-offence requirement. *Id.* at 12a.

SUMMARY OF ARGUMENT

Although the Ninth Circuit decided this case on constitutional grounds, it did not need to do so, and this Court need not do so, either. Settled principles of interpretation provide ample basis for construing Section 117(a) to extend to tribal court convictions resulting in incarceration only when those convictions were counseled. Such a construction makes it unnecessary to decide whether the district court's admitted use of *uncounseled* tribal court convictions as a predicate for Bryant's conviction violated the Fifth or Sixth Amendments.

Indeed, no fewer than three settled principles of interpretation require that Section 117(a) be construed in this manner if the text allows it. First, under the constitutional doubts doctrine, if a statute can reasonably be read in a way that does not raise constitutional problems, that reading is preferred to an alternative that raises such problems. See, *e.g., United States* v. *Stevens*, 559 U.S. 460, 481 (2010). Surely the Ninth Circuit's constitutional analysis—and its holding that invocation of Section 117(a) here violates the Sixth Amendment—provide ample basis for invoking this doctrine. The rule of lenity points in the same direction, requiring that any ambiguities in criminal statutes be read in a defendant's favor. See, *e.g., Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)). Finally, wherever possible, statutes that address Indians must be interpreted to avoid affecting them negatively, with doubtful provisions construed in their favor. See, *e.g., Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). Here, it would be manifestly contrary to the interests of American Indians, many of whom are poor and lack

adequate education, to subject them to the risk of substantial federal prison time based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent.

Nor is there any doubt that, insofar as tribal court convictions involving incarceration are concerned, Section 117(a) can reasonably be construed as limited to *counseled* convictions. First, the linguistic context of the word "convictions" suggests that Congress had in mind only counseled convictions—as indicated by its inclusion of "tribal court" convictions in a series with "Federal" and "State" convictions, both of which require a right to appointed counsel. See, *e.g., Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Second, it is presumed that when Congress acts, it is aware of relevant, pre-existing legal precedent. See, *e.g., Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010). And at the time Section 117(a) was adopted in 2006, the most directly pertinent authority was the Ninth Circuit's 1989 decision in *United States* v *Ant*, which held that the Sixth Amendment *bars* the government from using an uncounseled conviction that resulted in incarceration in a subsequent federal criminal prosecution. See 882 F.2d 1389, 1394–95 (1989).

For these reasons, whether or not the Court is persuaded by the Ninth Circuit's constitutional analysis, it can and should hold that, insofar as Section 117(a) covers tribal convictions resulting in incarceration, the statute is limited to counseled convictions. The Court can thus avoid subjecting disadvantaged Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

ARGUMENT

THE COURT CAN AND SHOULD CONSTRUE SECTION 117(A) AS NOT APPLYING TO UNCOUNSELED TRIBAL-COURT CONVICTIONS, THEREBY AVOIDING THE NEED TO RESOLVE THE CONSTITUTIONAL ISSUES PRESENTED HERE.

Before this Court addresses the constitutional questions presented here, it would be wise to first grapple with the statutory text. See *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). As shown below, settled principles of statutory interpretation require that Section 117(a) be read, if fairly possible, *not* to include uncounseled tribal-court convictions. And two accepted canons—*noscitur a sociis* and the rule that Congress is presumed to be aware of contemporaneous case law—make clear that Section 117(a) can reasonably be read not to include such convictions.

A. Settled principles require that Section 117(a) be read, if fairly possible, not to include uncounseled tribal-court convictions, at least where they resulted in incarceration.

Three traditional tools of statutory interpretation—the constitutional doubts doctrine, the rule of lenity and the Indian law canon—each strongly suggest that this Court should find Section 117(a) inapplicable to uncounseled tribal-court convictions.

1. Constitutional Doubts

First, this Court has repeatedly held that where reasonably possible statutory language should "'be

construed to avoid serious constitutional doubts.'" *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (quoting *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51 (2012). This canon "rest[s] on the reasonable presumption that Congress did not intend [to] raise" such doubts. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005).

For reasons well explained by the Ninth Circuit and respondent, construing Section 117(a) to include uncounseled convictions that resulted in imprisonment raises Sixth Amendment and due process questions that are, at a minimum, difficult. This Court's decision in *Nichols* v. *United States* provided a limited exception to the Sixth Amendment's right to counsel: the federal government could use an uncounseled prior conviction to "enhance the sentence of a subsequent offense"—but only if the original conviction still "complied with the Sixth Amendment." 511 U.S. 738, 740 (1994). However, the federal government now demands that this exception be expanded to include uncounseled convictions obtained entirely outside the bounds of the Sixth Amendment—in sovereign tribal courts—and then use those convictions in federal courts that are constrained by this constitutional provision. See *United States* v. *Bryant*, 769 F.3d 671, 677–78 (9th Cir. 2014). This approach thus implicates serious Sixth Amendment and due process issues that are not easily resolved.

Instead of deciding whether Congress intended to violate or even approach violating these constitutional

principles, this Court should instead construe the statute in a way that avoids these constitutional questions.

2. Rule of Lenity

Additionally, given that Section 117(a) is a criminal statute "if [this Court's] recourse to traditional tools of statutory construction leaves any doubt about the meaning of [the statute]," it must apply the rule of lenity. *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion); *accord* SCALIA & GARNER, READING LAW at 296–302. This rule requires that any "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)).

If the Court is uncertain as to how Section 117(a) law comports with the Sixth Amendment right to counsel and associated due process principles—or even as to how the statute should be interpreted apart from constitutional concerns—the Court should resolve this uncertainty in favor of the criminal defendant. As discussed below, it is far from clear that Congress intended this law to apply to defendants who were never provided the right to counsel, especially those imprisoned as a result of an earlier prosecution. And when Congress does not clearly detail what it intends to punish, the resulting uncertainty should be resolved in favor of the defendant.

3. Laws Affecting Indians

This Court has also long held that where reasonably possible "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at

766 (1985). To be sure, the canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). But if there *is* ambiguity, the meaning of a statutory provision addressing Indians should be resolved in accordance with this Court's Indian law canons. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §2.02 at 113 (Nell Jessup Newton et al. eds., 2012) (citing Supreme Court cases for the proposition that "[t]he basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be construed liberally in favor of the Indians and that all ambiguities are to be resolved in their favor.").

Here, as Petitioner notes, Congress had a clear intention to protect Native American women and to punish repeat domestic abusers. See Pet. Br. at 6. But as discussed below, there is no clear intention from the text or context that Congress intended to enhance the punishments for defendants based on uncounseled convictions, especially when those convictions resulted in incarceration. And especially in light of recent amendments to the Violence Against Women Act, it is most unlikely that Section 117(a)'s worthy objective would be materially advanced by allowing federal prosecutors to rely upon uncounseled convictions.[2]

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[2] The Violence Against Women Act of 2013 gave tribes the authority necessary to exercise "special domestic violence jurisdiction" over domestic violence offenders, regardless of their race. 25 U.S.C. § 1304(b). Congress also set aside funds so that the Attorney General can strengthen tribal courts, § 1304(f)(1), including supporting tribal prosecution efforts. § 1304(f)(1)(B). Armed

Moreover, it would be manifestly contrary to the interests of American Indians, many of them poor and lacking in literacy and education,[3] to subject them to the risk of substantial federal prison sentences based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent. This and other courts have long recognized the critical importance of the right to counsel in protecting defendants from the risk of conviction based on flimsy evidence or, worse, when they are actually innocent. In *Whorton* v. *Bockting*, for example, the Court noted that "the risk of an unreliable verdict is intolerably high" when a criminal defendant is denied representation. 127 S. Ct. 1173, 1182 (2007) (*citing Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)). Representation by counsel in critical stages of criminal proceedings is thus crucial to ensure fair and accurate outcomes, regardless of the quality of the courts conducting those proceedings. See, *e.g.*, *Missouri* v. *Frye*, 132 S. Ct.1399, 1405 (2012) (quoting *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009)).[4] Indeed, for these and other reasons, this Court has said the right to counsel is so important that its complete

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with these tools, tribal courts and prosecutors are now much better equipped to handle domestic violence prosecution than they were when Section 117(a) was enacted.

[3] See NATIONAL CENTER FOR EDUCATION STATISTICS, Adult Literacy in America at 31 (1993) https://nces.ed.gov/ pubs93/93275.pdf (noting that half of adult American Indians are illiterate); Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RESEARCH (June 13, 2014), http://www.pewresearch.org/fact-tank/2014/06/ 13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/.

[4] That, of course, is why the position urged here does not in any way denigrate tribal courts.

denial is one of the "very limited class of cases" in which the error is structural and thus subject to automatic reversal. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999).

Given the enormous risks to American Indians if Section 117(a) were interpreted as the Government proposes, the Indian law canon requires that the statute be interpreted in a way that favors Indian defendants–in this case, by not including uncounseled tribal-court convictions.[5]

B. Under two settled canons of construction, Section 117(a) can reasonably be read (at a minimum) as limited to counseled convictions.

Settled canons of construction also make clear that Section 117(a) can reasonably read in that manner. The language of Section 117(a) reaches defendants who have "a final [domestic abuse] conviction in Federal, State, or Indian tribal court proceedings." 18 U.S.C. § 117(a) (Supp. II 2014). The phrase "conviction in Indian tribal court" does not automatically establish that uncounseled tribal-court convictions are included.

To determine the proper meaning of that phrase, or at least its permissible meanings, it is important to ex-

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[5] This approach, of course, would also allow Congress to amend the law if it really intends that Section 117(a) apply to all uncounseled tribal court convictions. Obviously, such an amendment would be subject to challenge under the Fifth and Sixth Amendments. And it would be invalid for reasons explained by the Ninth Circuit and respondent here. But at least this Court would know that the Government's construction of Section 117(a) is really what Congress intends.

amine the context of the phrase as well as of the statute. See *Yates*, 135 S. Ct. at 1081–82. And in this case, the Court should first apply the *noscitur a sociis* or "associated words" canon to examine the phrase's textual context. Then the Court should examine the statute's broader context, bearing in mind the presumption that Congress is aware of pre-existing case law.

1. *Noscitur a Sociis*

As the Court is well aware, *noscitur a sociis* simply means that "'a word is given more precise content by the neighboring words with which it is associated.'" *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008); *accord* SCALIA & GARNER, READING LAW at 195–98. The Court relies on this principle to "'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates*, 135 S. Ct. at 1085 (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)); 1089 (Alito, J., concurring) (agreeing with the four justices in plurality that this canon should apply).

For example, in *Freeman*, this Court determined that the meanings of the words "portion" and "percentage" did not "mean the entirety" See 132 S. Ct. at 2042. The third word, "split," provided the needed clarification. Because "split" could not refer to "the entirety," neither could "portion" or "percentage." See *id.* Thus the neighboring words can inform as to what Congress meant when it used the word or phrase at issue. And the Court could therefore properly focus on what the *neighboring* words or phrases had in common and apply that to the word or phrase at issue. See *id.*

at 2042; see also *Yates*, 135 S. Ct. at 1085; *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Here, the phrase "Indian tribal court proceedings" is preceded by "Federal" and "State" court proceedings. See 18 U.S.C. § 117(a) (Supp. II 2014). And the United States Constitution requires that, where incarceration is at issue, criminal defendants must be provided counsel in both federal and state courts. See U.S. CONST. amend. VI; *Gideon* v. *Wainwright*, 372 U.S. 335, 342–45 (1963); *Murray* v. *Giarratano*, 492 U.S. 1, 6 (1989); *Maryland* v. *Kulbicki*, 136 S.Ct 2, 3 (2015) (per curiam). Thus, a requirement that is necessarily applicable to the neighboring phrases—that is, a requirement that the conviction be "counseled"—would naturally apply to the phrase "conviction in tribal court" as well.

Another example is *State* v. *Taylor*, 594 N.W.2d 533 (Minn. Ct. App. 1999), discussed and endorsed in the treatise by Justice Scalia and Bryan Garner. See SCALIA & GARNER, *supra*, at 196–97. In that case, a statute made it a crime to carry or possess a pistol in a motor vehicle unless it was unloaded and "contained in a closed and fastened case, gunbox, or securely tied package." 594 N.W.2d at 535. When police stopped the defendant, Ms. Taylor, it was discovered that she had a pistol in her (presumably closed) purse, on the basis of which she claimed that she was carrying the pistol lawfully. On appeal, however, the State argued that *noscitur a sociis* requires that the word "case" be read restrictively, that is, as a container that prevents the gun from being readily retrievable. *Id.* at 536.

The appellate court recognized that the defendant's proposed reading—i.e., any closed and fastened recep-

tacle, including her purse—comported with the ordinary meaning of "case." But the court ultimately agreed with the State that, given the surrounding words in the statute, "'case' should be construed in a similarly narrow sense.'" *Id.* Accordingly, the court ruled that "'case' should be construed as having a limited, technical meaning similar to 'gunbox,' the word that follows it." *Id.*

So too here. As in *Taylor,* the word "conviction" in ordinary parlance might well include Mr. Bryant's prior uncounseled misdemeanor convictions. See Respondent's Brief at 23–28. But in the context of *this* statute, it is at least permissible – if not mandatory – to read the word "conviction" in the more limited, technical sense of a "conviction" that complies with the constitutional requirements applicable in the other classes of proceedings listed in the statute, that is, "Federal [or] State court" proceedings. And that of course means that, at least where incarceration results, for the statute to apply the defendant must have been afforded a right to counsel.

In short, *noscitur a sociis* makes it at least reasonable to read "conviction" in Section 117(a) as requiring compliance with the usual Sixth Amendment requirements—even though that Amendment may not of its own force technically apply to proceedings in tribal court.

2. Presumption that Congress Is Aware of Relevant Law

The well-settled presumption that Congress is aware of relevant background law makes such a reading even more reasonable. Specifically, the existence of *Nichols* and *Ant* when Section 117(a) was passed

strongly suggests a legislative intention or understanding that, where incarceration results, predicate offenses must be counseled. This Court "assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.*, 559 U.S. at 648.

Congress passed Section 117(a) in 2006. See 18 U.S.C. § 117(a) (Supp. II 2014) At that time, it presumably was aware of *Nichols*. So it presumably knew that only when an uncounseled prior conviction *complies* with the Sixth Amendment, it can be "relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 740, 746–47. And that strongly suggests that, when the prior conviction does not "comply" with the Sixth Amendment–either because that Amendment was affirmatively violated *or* because, as here, that Amendment simply didn't apply in the prior proceedings—Congress would not assume that the prior conviction could serve as a predicate offence under Section 117(a).

That conclusion is buttressed by the presence of *United States* v. *Ant*, 882 F.2d 1389 (9th Cir. 1989), which squarely answers that question. Indeed, *Ant* would have been the *only* appellate decision at the time dealing with the specific issue of using uncounseled prior convictions from tribal court; neither of the two circuit decisions that later disagreed with *Ant* were decided until after the statute passed. See *United States* v. *Shavanaux,* 647 F.3d 993 (10th Cir. 2011); *United States* v. *Cavanaugh,* 643 F.3d 592 (8th Cir. 2011).

Ant, moreover, held that when an uncounseled prior conviction is obtained in a manner that *would have violated* the Sixth Amendment in federal or state

court, it cannot be used as a sentence enhancing tool. See *Ant*, 882 F.2d at 1394–95. Thus it deals with a different situation than *Nichols*, and indeed is still considered valid law.

Moreover, while some academics may have argued in 2006 that there was some tension between *Nichols* and *Ant*, Congress certainly did not have a conclusive answer on whether *Ant* was still valid. So Congress must be presumed to have known that, if it wished to include *uncounseled* tribal-court convictions in Section 117(a), it needed to do so expressly and clearly.

Because it did not address the *Ant* decision, either directly or indirectly, Congress appears to have either intended to exclude uncounseled convictions or, at a minimum, did not purposefully intend to include them. Either way, Congress's silence on that issue in the face of *Ant* buttresses the conclusion that, to the extent it reaches proceedings that resulted in incarceration, Section 117(a)'s reference to "convictions in tribal court proceedings" should be read to encompass only counseled convictions.

CONCLUSION

For all these reasons, the Court can and should interpret Section 117(a) as not applying to uncounseled tribal-court convictions. Such a construction will substantially reduce the risk that indigent American Indians—unlike other impoverished groups—will routinely be sentenced to substantial prison time based on uncounseled prior convictions, including convictions for crimes they did not commit. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A: Interests of Particular *Amici*

The National Association for Public Defense ("NAPD") is an association of over 11,000 professionals critical to delivering the right to counsel. NAPD members include attorneys responsible for managing public defender programs and ensuring the constitutional right to effective assistance of counsel. We are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and through a diversity of traditional and holistic practice models.

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Missouri Association of Criminal Defense Lawyers (MACDL) is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. It strives to improve the quality of justice in Missouri by seeking to ensure fairness and equality before the law

The Montana Association of Criminal Defense Lawyers ("MTACDL") is an affiliate of the National Association of Criminal Defense Lawyers. MTACDL was formed in 1997 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of those who represent persons accused of crimes; and to promote the proper and fair administration of justice.

Oregon Criminal Defense Lawyers Association ("OCDLA") is a 1,200-member non-profit organization of private criminal defense attorneys, public defenders, investigators and others engaged in criminal and juvenile defense. OCDLA works to improve the quality of the defense function in the juvenile and adult justice systems, protect the constitutional and statutory rights of those accused and convicted of crimes, and educate the public, the courts, and the legislature about the defense function.

Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL membership includes private criminal defense lawyers, public defenders, and related professionals, all committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual constitutional rights.

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No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL BRYANT, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND EXPERIENCED TRIBAL COURT CRIMINAL LITIGATORS IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND EXPERIENCED TRIBAL COURT CRIMINAL LITIGATORS IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 9,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to accused persons, criminal defense lawyers, and the criminal justice system as a whole.

Tova Indritz is a criminal defense lawyer in private practice in Albuquerque, New Mexico, where she represents Native American defendants in federal, state, and Indian tribal courts. A 1975 graduate of Yale Law

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1. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are being filed herewith.

School, Ms. Indritz was an Assistant Federal Public Defender in the District of New Mexico from 1976 to 1981, and the Federal Public Defender for that District from 1981 to 1995. During Ms. Indritz' tenure at the Federal Public Defender's office, about a quarter of her caseload consisted of Indian Country cases. Ms. Indritz teaches criminal defense lawyers practicing in federal, state, and tribal courts about Native American criminal justice issues, has testified before Congress and the United States Sentencing Commission about tribal criminal justice issues on multiple occasions, and is the co-chair of NACDL's Native American Justice Committee.

Nicholas A. Fontana is an attorney in private practice in Tucson, Arizona. Mr. Fontana served as the Chief Public Defender for the Pascua Yaqui Tribe from 2004 through 2010, and served as a judge pro tempore for the Tohono O'odham Tribal Court from 2011 through 2012. Mr. Fontana is currently admitted to the Tohono O'odham Tribal Court, and was previously admitted to the Navajo Nation Bar Association, Hopi Tribal Court, and Pascua Yaqui Tribal Court. Mr. Fontana has been a presenter on Indian Law at the Arizona Public Defender Association Annual Conference, Arizona Attorneys for Criminal Justice Winter Seminar, and the Annual National Border Town Racism Conference. Mr. Fontana graduated from the University of Arizona College of Law in 1992 and is a member of the State Bar of Arizona.

Cecilia Vaca served as a Defense Attorney at the Gila River Indian Community Defense Services Office from 2008 through 2014, and served as the Director of that office from 2011 through 2014. Ms. Vaca is currently an

Assistant Federal Public Defender in the Middle District of Alabama.

Amici are concerned about the question presented in this case because it implicates the rights of criminal defendants, and particularly of individuals who have been or may be convicted in Indian tribal courts, not to be imprisoned on the basis of proceedings that fail to comply with fundamental principles of fairness enshrined in the Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (ICRA).

SUMMARY OF ARGUMENT

This case presents a question of great importance to the subgroup of American citizens who are subject to the prosecutorial power of Indian tribal courts. For members of this group, a ruling for the petitioner would mean that the products of their uncounseled tribal court prosecutions could become elements of a federal crime punishable by up to ten years in prison. This prospect raises the question of whether tribal courts reliably provide criminal defendants with a level of due process sufficient to justify treating these convictions as elements of a serious federal crime.

Petitioner contends that they do, stressing that while Indian tribes are not subject to the constraints imposed upon federal and state governments by the Bill of Rights,[2] most of these rights are made applicable to tribal courts by ICRA.[3] In an amicus brief, the "oldest and largest organization representing Indian tribal governments"

2. *Talton v. Mayes*, 163 U.S. 376 (1896).

3. Petr. Br. at 19.

similarly assures this Court that ICRA "serves its role well, with tribal courts faithfully applying the statute to ensure that their determinations are reliable and fair."[4]

The purpose of this brief is to draw upon amici's knowledge and experience with tribal-court criminal litigation to give this Court an informed perspective from which to assess these claims. Amici will show that while Congress intended ICRA to make most of the protections enshrined in the Bill of Rights meaningfully applicable to tribal-court criminal defendants, that effort has failed. In reality, the rights set forth in ICRA are routinely ignored or rejected by tribal courts, without effective recourse for defendants. While there undoubtedly are many tribal judges and officials who seek to ensure that tribal-court prosecutions are reliable and fair, the unfortunate fact is that ICRA's guarantees commonly have little relation to the reality of tribal court criminal litigation. Amici urge the Court to factor this reality into its assessment of whether uncounseled tribal-court convictions should be permitted to become elements of a federal crime pursuant to 18 U.S.C. § 117(a).

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4. Br. *Amicus Curiae* of Nat'l Cong. of Am. Indians at 1, 8-9 (hereinafter *NCAI Amicus Br.*).

ARGUMENT

I. The Indian Civil Rights Act was enacted to address pervasive violations of civil rights by Indian tribal courts.

A. History and background of tribal courts

Before the European conquest of North America, Indian tribes had their own "concepts of fairness in the way [they] handled disputes, seeking both to compensate the victim and to rehabilitate the wrongdoer."[5] The federal government initially gave them leeway to develop their own systems of justice.[6] But in the 19th century, the federal government begin pursuing a policy of assimilation, affirmatively separating Indians from their cultural traditions and eroding their traditional methods of dispensing justice.[7] In the late 1800s the government began imposing adversarial-style courts on tribes, created under the Code of Federal Regulations and popularly known as the "CFR courts."[8] Many tribe members viewed the CFR courts as agents of assimilation that were designed to destroy Indian customs and religious

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5. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 226 (1989) (hereinafter Tso, *Tribal Courts*).

6. F. Cohen, *Handbook of Federal Indian Law* § 1.03 (2012).

7. *Id.* § 1.04; Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. Rev. 37, 63 (Summer 2011) (hereinafter Creel, *Respect for Tribal Courts*).

8. Creel, *Respect for Tribal Courts* at 63 & n.145.

practices.[9] This inauspicious introduction of adversarial-style litigation into Indian country was complemented by a policy today recognized as blatantly unlawful: Until 1961, when the regulation was held unconstitutional, the CFR courts forbade defendants from being represented by counsel.[10]

The 20th century was marked by vacillations in federal Indian policy that "resemble[d] a pendulum swinging from one extreme to another."[11] In 1934 the pendulum swung toward tribal self-determination with the Indian Reorganization Act, which authorized tribes to create their own courts to replace the CFR courts.[12] Today there are well over 200 such courts in Indian country.[13]

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9. *Id.* at 63-64.

10. 25 C.F.R. § 11.9CA (1958) ("No professional attorney shall appear in any proceedings before the Court of Indian Offenses."); 26 Fed. Reg. 4,360-61 (May 19, 1961) (revoking the regulation); *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. 501 (1961) (hereinafter *1961 Hearings*) (statement of William A. Creech, Chief Counsel and Staff Director of the Senate Judiciary Committee's Subcommittee on Constitutional Rights).

11. Tso, *Tribal Courts* at 227 n.2.

12. 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 *et seq.*).

13. See Tribal Court Clearinghouse, *Tribal Courts*, available at: http://www.tribal-institute.org/lists/justice.htm (listing 257 tribal courts) (last visited Feb. 1, 2016); National Center for State Courts, *State Court Organization, 2004: Table 33*, available at: http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/159 (listing 309 Tribal Justice Forums) (last visited Mar. 1, 2016).

B. Enactment of the Indian Civil Rights Act

The poor example set by the CFR courts, the fickleness in federal Indian policy, and a host of other factors made it difficult for tribal courts to evolve into tribunals that can reliably guarantee due process to criminal defendants. Facing limited resources and competing pressures to "import[] foreign concepts of justice and process" while simultaneously creating systems "reflective of internal tribal norms, traditions, and values," tribes created hybrid tribunals that effectively advanced neither objective: "assimilative tribal court systems with concomitant gaps in structure or process."[14] In the early 1960s, concerned by reports that "the individual Indians were being deprived of basic constitutional rights by the Federal, State, tribal, and local governments,"[15] the Senate Committee on the Judiciary's Subcommittee on Constitutional Rights (the Subcommittee) convened a set of hearings and staff investigations to look into the matter.

The Subcommittee's investigation proved the accuracy of James Madison's observation, in *The Federalist* Number 10, that small republics are inherently prone to factionalism and oppression.[16] During the hearings, the Subcommittee heard extensive allegations of tribal harassment and incarceration of political dissidents,

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14. Creel, *Respect for Tribal Courts* at 56.

15. *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2d Sess. 713 (1962) (statement of Sen. Burdick) (hereinafter *1962 Hearings*).

16. *The Federalist* No. 10, at 126-27 (James Madison) (Isaac Kramnick ed., 1987).

restriction of religious freedom, and pervasive corruption. And while it uncovered a broad array of troubling practices, the Subcommittee's investigation "revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice."[17] Senator Burdick of North Dakota informed the Subcommittee that "in many cases the tribal courts [we]re 'kangaroo courts.'"[18] Senator Ervin proclaimed himself "much perplexed" by evidence indicating that "in all too many cases tribal courts were entirely subservient to the tribal council."[19] Witnesses reported that, like the CFR courts prior to 1961, many tribes prohibited attorneys from representing defendants in their courts.[20]

The Subcommittee drafted a set of bills to address these concerns. Initially it proposed to provide broadly that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution."[21] But after the Interior Department expressed concerns that "the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion,"

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17. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

18. *1961 Hearings* at 88.

19. *Id.* at 135.

20. *Id.* at 483 (testimony of former San Juan Pueblo Governor Preston Keevana); *id.* at 487 (testimony of R.A. Wardlaw, assistant to the President of the Mescalero Apache Tribe).

21. *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. 5 (1965) (hereinafter *1965 Hearings*).

the Subcommittee agreed to water down the Bill of Rights protections applicable to tribal governments.[22] In place of the straightforward application of constitutional protections, the Subcommittee drafted a proposal that paralleled the Bill of Rights in many respects, but contained substantial modifications. Perhaps most significantly, the bill guaranteed a tribal court criminal defendant the assistance of counsel only "at his own expense."[23]

The Subcommittee had considered guaranteeing appointed counsel in tribal court prosecutions pursuant to the recently-enacted Criminal Justice Act of 1964, but was informed that this would be impractical because funding to pay appointed lawyers was not available.[24] Moreover, this Court would not hold until 1972 that the Sixth Amendment guarantees criminal defendants the assistance of government-supplied counsel in any case resulting in actual imprisonment,[25] and testimony at the

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22. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 590 (1971-72) (hereinafter Burnett, *Historical Analysis*).

23. 113 Cong. Rec. 13,473 (May 23, 1967).

24. Burnett, *Historical Analysis* at 591; *see also NCAI Amicus Br.* at 5 ("Congress excluded the particular right to indigent defense counsel largely because of 'the cost which the guarantee would impose on . . . already impoverished tribes'") (quoting Burnett, *Historical Analysis* at 590-91); *The Indian Civil Rights Act: Report of the United States Commission on Civil Rights* 5 (1991) (hereinafter *1991 Civil Rights Report*) ("Cognizant of tribal economic constraints, [ICRA] does not require tribes to provide free counsel for criminally accused . . .").

25. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Subcommittee's hearings indicated that tribal courts rarely imposed prison sentences exceeding six months.[26] As originally enacted, ICRA codified this limit by capping tribal-court sentences at six months of imprisonment and a $500 fine.[27] Two decades later, Congress increased the cap to one year of imprisonment and a $5,000 fine.[28] Tribes rendered these caps largely ineffective by "stacking" multiple one-year sentences for separately-defined crimes deriving from single incidents.[29]

Congress eventually enacted the Subcommittee's proposals as Titles II through VII of the Civil Rights Act of 1968.[30] Although the Subcommittee had initially proposed federal court oversight in the form of a *de novo*

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26. *1961 Hearings* at 384 (testimony of Hualapai Judge Shirley Nelson); *id.* at 462-63 (testimony of Zuni Judge Alfred Sheck); *id.* at 465 (testimony of Nambe Pueblo Governor Ernest Mirabal); *id.* at 484 (testimony of former San Juan Pueblo Governor Preston Keevana); *1962 Hearings* at 574 (testimony of Department of Interior Regional Solicitor Palmer King); *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong., 1st Sess. 871 (1963) (testimony of Warm Springs General Counsel Owen M. Panner); *1965 Hearings* at 237 (testimony of Crow Tribe delegate Edison Real Bird). The "CFR Courts" were subject to a codified six-month cap. 25 C.F.R. §§ 11.33-11.87NH (1967).

27. Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968).

28. Pub. L. No. 99-570, § 4217 (1986).

29. *Miranda v. Anchondo et al.*, 684 F.3d 844 (9th Cir. 2012); *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

30. Pub. L. No. 90-284, §§ 201-701, 82 Stat. at 77-81 (1968).

trial in federal court following a tribal court conviction,[31] the law as enacted provided that the sole means by which individuals could vindicate their ICRA rights in federal court was through a habeas corpus petition.[32]

II. The Indian Civil Rights Act has failed to meaningfully extend Bill of Rights protections to tribal court criminal defendants.

As this history illustrates, Congress's purpose in extending most of the Bill of Rights protections to tribal court criminal defendants in 1968 was to rectify a situation in which many citizens were being convicted in fundamentally unfair tribunals, and to raise the quality of criminal justice in tribal courts to a level comparable to state and federal courts. But after examining the records of a 2003 tribal-court conviction, Ninth Circuit Judge Alex Kozinski found a form of "rough and tumble justice" reminiscent of the Subcommittee's findings in the early 1960s.[33] In short, as amici will illustrate below, ICRA has failed. There are multiple, mutually-reinforcing reasons for this failure, which can be broken down into eight themes.

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31. *1965 Hearings* at 6-7.

32. Pub. L. No. 90-284, tit. II, § 203 (1968) (codified at 25 U.S.C. § 1303) ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

33. *Alvarez v. Tracy*, 773 F.3d 1011, 1035 (9th Cir. 2014) (Kozinski, J., dissenting).

A. Poverty and powerlessness of tribal criminal defendants

The subgroup of American citizens subject to the prosecutorial power of tribal courts is distinctly ill-suited to securing counsel, effectively defending themselves, or lobbying Congress for effective enforcement of the rights guaranteed by ICRA. The poverty rate among Indians is 27 percent – higher than that of any other racial group – and in some states it is over 40 percent.[34] They are largely scattered in remote, small communities, commonly subject to language and cultural barriers to access to relief from the state or federal governments, and racially distinct from the broader population.[35] For a vulnerable group such as this, due process protections are especially crucial.[36] But in the legislative and judicial arenas, these citizens' interest in fair procedures is routinely overshadowed by the powerful and well-funded interests that support strengthening their government's law enforcement authority – including the federal government and lobbying

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34. U.S. Census Bureau, U.S. Dep't of Commerce, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011* 2-6 (2013).

35. Notably, when Congress in 2013 for the first time authorized tribes to extend their criminal jurisdiction to non-Indians, it simultaneously extended to *non*-Indian defendants Bill of Rights protections – including the right to appointed counsel in any tribal-court prosecution potentially resulting in incarceration "of any length" – that still are not provided to Indians. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (2013) (codified at 25 U.S.C. § 1304(d)).

36. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Univ. Press 1980).

groups representing the interests of tribal governments.[37] In short, as the former Director of Dakota Plains Legal Services told the Commission on Civil Rights, "[t]here is a *tribal* lobby in D.C., not an *individual* lobby."[38]

B. Lack of counsel

When disadvantaged individuals such as these are haled into court to face criminal charges, the importance of the assistance of counsel is at its apex. ICRA's most essential flaw, therefore, was that Congress "imposed a set of rights, and then failed to include the one factor that could protect those rights: the fundamental human right of access to defense counsel."[39] Indeed, the history of tribal-court criminal litigation confirms this Court's observation in *Gideon v. Wainwright* that the right to be heard may be "of little avail if it d[oes] not comprehend the right to be heard by counsel."[40]

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37. In the instant case, for example, an organization "representing Indian tribal governments" retained a prominent Washington, D.C. law firm to file a brief proclaiming that "ICRA serves its role well, with tribal courts faithfully applying the statute to ensure that their determinations are reliable and fair." *NCAI Amicus Br.* at 1, 8-9.

38. *Enf't of the Indian Civil Rights Act: Hearing before the United States Comm'n on Civil Rights held in Rapid City, South Dakota Jul. 31-Aug. 1 and Aug. 21, 1986* 22 (testimony of Anita Remerowski, Former Director, Dakota Plains Legal Services) (emphases added) (hereinafter *Rapid City Hrg.*).

39. Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. Race & L. 317, 351 (Spring 2013) (hereinafter Creel, *Right to Counsel*).

40. 372 U.S. 335, 344-45 (1963) (internal quotation marks omitted).

The 2003 trial of Fortino Alvarez, which inspired Judge Kozinski's remarks quoted above, is illustrative. Mr. Alvarez did not have the assistance of counsel at any point in his prosecution for domestic violence and other charges.[41] When agents of his tribe arrested him and imprisoned him in a facility with no law library, he was just out of his teens and had a seventh-grade education.[42] At his arraignment he was given a form listing his ICRA rights, but no one explained to him what they meant.[43] At his pretrial hearing he said he thought he was ready to go to trial, but exhibited serious confusion as to how many charges were pending against him.[44] He simultaneously said he did not want to go to trial and adhered to his not-guilty pleas.[45] He made inconsistent statements about pleading guilty to certain charges, and finally acknowledged that he "d[id]n't really know about court that much."[46] The court proceeded to set his case for a bench trial.[47]

At his trial Mr. Alvarez made no opening or closing statements, called no witnesses, presented no evidence, cross-examined no witnesses, and made no objections –

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41. *Alvarez*, 773 F.3d at 1014 n.3.

42. *Id.* at 1031 (Kozinski, J., dissenting); *Alvarez v. Tracy*, No. 08-cv-2226 (D. Ariz.) (Doc. 104 at 4).

43. *Alvarez*, 773 F.3d at 1034 (Kozinski, J., dissenting).

44. *Alvarez v. Tracy*, No. 08-cv-2226 (D. Ariz.) (Doc. 104 at 4).

45. *Id.*

46. *Id.*

47. *Id.*

including when a tribal police officer read into evidence the accusations of the non-testifying alleged victim.[48] When the court asked Mr. Alvarez whether he wanted to rest his case following the tribe's presentation of evidence, he responded: "What do you mean by that?"[49]

The court proceeded to find Mr. Alvarez guilty and set the case for sentencing.[50] During a break, the prosecutor negotiated with Mr. Alvarez regarding additional counts, then informed the court that they had reached an agreement with respect to yet-untried charges.[51] Mr. Alvarez confirmed the prosecutor's representation, but his presentence report showed that he failed to understand which charges he was pleading guilty to.[52] At the sentencing hearing, the judge summarily accepted the tribe's recommendation of a five-year prison sentence, then asked Mr. Alvarez whether he had "[a]ny questions?"[53] Mr. Alvarez responded: "Well, so I'll get probation for this sentencing or what?"[54]

Because "most American Indians cannot afford or find competent retained counsel to appear in tribal court,"[55]

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48. *Id.* at 4-5, 7-8.

49. *Id.* at 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Creel, *Right to Counsel* at 319-20.

Mr. Alvarez's experience is unfortunately quite typical of tribal court criminal litigation. Some tribes (including Mr. Alvarez's) have, to their credit, created public defender positions, but these defenders are available to only a small proportion of tribal-court criminal defendants.[56] And while many tribes permit non-lawyer "advocates" to serve as counsel for criminal defendants in their courts, the availability of these lay practitioners does not meaningfully ameliorate the unavailability of law-trained counsel. Many tribal advocates have not graduated from law school, or even from high school.[57] Tribes commonly require nothing more than a modest payment, or some knowledge of the tribe's code, as a precondition for representing criminal defendants in their courts.[58] These lay practitioners may have little or no understanding of criminal procedure or of the meaning of the rights enumerated in ICRA.[59]

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56. The Navajo Nation public defender office, for example, represents only approximately one-tenth of all criminal defendants prosecuted in Navajo Nation courts. *Tribal Law and Order: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (2009) (testimony of Tova Indritz), 2009 WL 4693354 at 6 (hereinafter *2009 House Hearing*).

57. *Id.* at 8; Am. Indian Law Ctr., Inc., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report* 30 (2000) (75.6% of tribes responding to survey permit advocates who do not have law degrees or are not members of a state bar to represent clients in their courts) (hereinafter *AILC Report*).

58. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19); *Rapid City Hrg.* at 38 ("All you have to do is pay $50 and you become a lay advocate.") (testimony of Elma Winters, Lay Advocate, Pine Ridge Reservation).

59. The advocate's performance in the sexual abuse prosecution of Michael Jackson is illustrative. Mr. Jackson's advocate conducted

They may also suffer from serious conflicts of interest that law-trained counsel would recognize: In one notable case, a tribe appointed the arresting officer in the incident underlying the prosecution to act as the defendant's advocate.[60]

C. Lack of accessible and reliable codes and rules

In order for an unrepresented defendant to have a fighting chance of effectively representing herself, she must have access to the laws and rules that will govern her prosecution. Unfortunately, these crucial resources are commonly unavailable in Indian country.

"Unlike federal and state governments, most tribes have no mandate to publish their laws," and "many tribes have chosen not to make their laws publicly available."[61]

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no investigation, failed to communicate with Mr. Jackson before trial, failed to enter his appearance until the day before trial, failed to respond to the prosecution's continuance motions, failed to object to an amended complaint presented moments before trial began, failed to object to the prosecutor's leading questions and eliciting of incriminating hearsay, and failed to point out to the court that a DNA report excluded Mr. Jackson as the source of semen found on the alleged victim's blanket. *Jackson v. Tracy*, No. 12-17179 (9th Cir.) (DktEntry: 6-1 at 26-30). (The Ninth Circuit affirmed the denial of habeas corpus relief to Mr. Jackson, reasoning that ICRA "does not protect a criminal defendant's right to the effective assistance of a tribal advocate who is not admitted to the bar." *Jackson v. Tracy*, 549 F. App'x 643, 644 (9th Cir. 2013).)

60. *Romero v. Goodrich*, No. 09-cv-232 (D.N.M.) (Doc. 1 at 6).

61. Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 Law Libr. J. 199, 201 (Spring 2014) (hereinafter Shucha, *(Un)availability of Tribal Law*).

Many tribes operate "traditional" courts that follow unwritten rules – and even where tribes do have written codes, those codes may not reflect their actual practices. Tribal court defendants may find that there are "no rules of procedure," and that the rules are "being made up as [the case goes] along."[62] Tribes may even codify this *ad hoc* approach: The criminal procedure rules of the Confederated Tribes of the Colville Reservation, for example, specify that "[t]he Court shall not be bound by common law rules of evidence, but shall use its own discretion as to what evidence it deems necessary and relevant to the charge and the defense."[63] Many tribes elevate unwritten tribal custom over their written codes.[64] Others publish codes, but do not make them available to criminal defendants, or simply do not follow them. In a 1999 case, the Ninth Circuit noted that while the tribe in question purported to have an appellate court, two years after the petitioner sought appellate review the tribe had yet to set a briefing schedule, schedule an argument, meaningfully respond to the appellant's notice of appeal, or answer the appellant's correspondence, "creat[ing] doubt that a functioning appellate court exists."[65] The

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62. *2009 House Hearing* (testimony of Tova Indritz), 2009 WL 4693354 at 11.

63. Code of the Confederated Tribes of the Colville Reservation, tit. 2, § 2-1-171, available at http://www.colvilletribes.com/updatedcode.php (last visited Mar. 11, 2016).

64. Robert D. Cooter and Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 Am. J. Comp. L. 29, 61 (Winter 2008) ("the typical order of authority for tribal judges is custom first, code second, and federal law third") (hereinafter Cooter & Fikentscher, *Pragmatic Law*).

65. *Johnson v. Gila River Indian Community*, 174 F.3d 1032, 1036 (9th Cir. 1999).

same tribe more recently published a new code of appellate procedure, but years afterward its courts continued following the procedures – including shorter deadlines – set forth in the superseded code.[66]

Given that even legal research experts find tribal law "very difficult, if not impossible, to locate,"[67] it is hardly reasonable to expect uncounseled inmates to be able to do so. And while Congress in 2010 required tribes "make publicly available" their criminal laws and rules, that requirement is limited to cases involving prison sentences exceeding one year – expressly exempting from this mandate the misdemeanor prosecutions at issue in the instant case.[68]

D. Lack of law-trained judges

Compounding the above problems is the fact that, in contrast to federal- and state-court judges,[69] "few contemporary tribal judges attended law school."[70] Indeed, some tribal judges have no college degree.[71] Particularly in small communities with limited resources, judges may

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66. *Alvarez v. Tracy*, No. 12-15788 (9th Cir.) (DktEntry: 38-1 at 19-20).

67. Shucha, *(Un)availability of Tribal Law* at 199.

68. 25 U.S.C. § 1302(c).

69. S. Strickland, R. Schauffler, R. LaFountain & K. Holt, eds. *State Court Organization* (Last updated January 9, 2015) (Table 37b), available at www.ncsc.org/sco.

70. Cooter & Fikentscher, *Pragmatic Law* at 55.

71. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19).

simply be "volunteers from the community."[72] If these lay judges have received legal training, it likely consisted of short courses, often lasting no more than a week, provided by entities such as the National Indian Justice Center.

Recently the former chief judge (and later lay advocate) from a major tribe was interviewed about his representation of a defendant charged with sexual abuse. The former judge, who said he had attended week-long training sessions provided by the National Indian Justice Center, had failed to object at trial when the prosecutor asked leading questions and elicited the alleged victim's incriminating statements from her mother.[73] Asked whether he knew what a leading question was, he responded that it was a question "without foundation."[74] Asked to define hearsay, he replied that the alleged victim's mother was permitted to recount her daughter's accusations because the alleged victim "was present to testify if validation was needed."[75]

These responses illuminate a self-evident fact: However well-intentioned laypersons appointed to preside over criminal cases may be, brief training courses do not prepare them to effectively guarantee the complex, quasi-constitutional rights enshrined in ICRA to criminal

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72. Bureau of Justice Assistance, Office of Justice Programs, U.S. Dept. of Justice, *Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America* 48 (2005).

73. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19); *Jackson v. Tracy*, No. 12-17179 (9th Cir.) (DktEntry: 6-1 at 26-30).

74. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19).

75. *Id.* at 19-20.

defendants – any more than crash courses in medicine could prepare them to competently perform surgery.[76]

E. Lack of judicial independence

In 1961, Senator Ervin noted that many tribal courts were "entirely subservient to the tribal council."[77] This remained true in 1997, when Justice O'Connor observed that tribal courts were "often subject to the complete control of the tribal councils,"[78] and it is still true today. As Justice O'Connor noted, this lack of independence "is not conducive to neutral adjudication on the merits and can threaten the integrity of the tribal judiciary."[79] Moreover, the abuses that flow from a council-controlled judiciary are especially pronounced in small tribal communities to which Madison's observation in *The Federalist* Number 10 are most pertinent. In such communities it is particularly likely that judges will be removed for issuing rulings

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76. *Rapid City Hrg.* at 28 ("my perception is that the lower [tribal] court judges really do not have any idea what the Indian Civil Rights Act means") (testimony of Krista Clark, Attorney, Dakota Plains Legal Services).

77. *1961 Hearings* at 135.

78. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 5 (Fall 1997) (hereinafter O'Connor, *Third Sovereign*); see also *Enf't of the Indian Civil Rights Act, Hearing Before the United States Comm'n on Civil Rights held in Washington, D.C. Jan. 28, 1988* 123 ("By saying that we have to have separation of powers, you do arrogantly try to interject yourselves between ourselves and our history . . .") (testimony of Suzan Shown Harjo, Executive Director, Nat'l Cong. of Am. Indians) (hereinafter *Washington, D.C. Hrg.*).

79. O'Connor, *Third Sovereign* at 5.

adverse to the council, or that criminal cases will be manipulated to favor whichever of competing factions controls the council while the case is underway.[80]

In some tribes the lack of judicial independence is carried to its logical conclusion: The council *is* the court. Even tribes with formal courts based on the state-federal model may simultaneously have "traditional" courts, in which the governor or council members serve as prosecutor, judge, and jury. These Star Chamber-type tribunals typically do not follow established rules of procedure or keep records of their proceedings.[81] Generally they operate on a presumption of guilt, require the accused to bear witness against himself, and involve little more than one-sided questioning followed by the summary imposition of sentence. In some tribes these roles are not even meaningfully distributed among council members, but are effectively exercised unilaterally by the governor.

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80. *Rapid City Hrg.* at 294 ("If [judges] make decisions that are not favorable with the council, then they will be removed without a hearing – because I know; I was one of the individuals that was removed.") (testimony of Walter Crooks, Cheyenne River Sioux Tribe); *Shortbull v. Looking Elk*, 677 F.2d 645, 646-47 (8th Cir. 1982) (tribal judge suspended without hearing after ruling against council); *cf. 2009 House Hrg.* (testimony of Tova Indritz) (describing case in which alleged victim was abusive ex-boyfriend of judge's sister, yet judge "declined to find he had any conflict of interest"), 2009 WL 4693354 at 13.

81. In one case an attorney brought a recording device with the intention of recording such a proceeding, and was told that in "traditional" courts, recordings are forbidden.

The case of Eddie Nelson Garcia is illustrative. In 2010 Mr. Garcia, an enrolled member of a federally-recognized tribe in New Mexico, was dating the former girlfriend of a tribal police officer.[82] The woman summoned Mr. Garcia to her cousin's house, where she informed him that the officer had, without her involvement, issued a restraining order in her name against Mr. Garcia.[83] While they were talking, the officer entered the house without notice or consent, punched Mr. Garcia in the face, and had him arrested.[84] Two days later the tribe brought Mr. Garcia before its traditional court – which consisted of a group of officials that included the officer who had him arrested – and presented him with a sheet of paper.[85] On the paper were the charges – which included violation of the restraining order, the sentence of 364 days' imprisonment, and the Governor's signature.[86] Mr. Garcia began to complain that the charges were unfounded, but then signed the paper, fearing that resistance would only lengthen his incarceration.[87] Later, a law school clinic asked the tribe for the record of Mr. Garcia's trial. The tribe sent the clinic two documents: the complaint, and the sentencing document.[88] When the clinic subsequently filed a federal habeas corpus petition alleging that Mr. Garcia's conviction violated ICRA, the tribe did not dispute Mr.

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82. *Garcia v. Massingill*, No. 10-cv-1151 (D.N.M.) (Doc. 1 at 2).

83. *Id.* at 3.

84. *Id.*; see also *id.* (Doc. 1-2 at 1-2).

85. *Id.* (Doc. 1 at 3).

86. *Id.*; see also *id.* (Doc. 1-2 at 6).

87. *Id.* (Doc. 1 at 3-4).

88. *Id.* at 5.

Garcia's allegations, but simply permitted judgment to be entered in his favor.[89]

It should be noted that while numerous additional examples are available,[90] the great majority of these summary convictions never make their way into federal court dockets. Those that do have benefited from the subject tribe's vicinity to a law clinic or federal court practitioner familiar with tribal court litigation and ICRA.[91] It should

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89. *Id.* (Docs. 7-2, 12).

90. *See, e.g., Pacheco v. Massingill*, No. 10-cv-923 (D.N.M.) (former United States Marine arrested after tribal officials entered and searched his home without consent while he was sleeping and claimed to find contraband, three days later he pleaded guilty without opportunity to request a trial or seek counsel, and was sentenced to two years of incarceration); *Abel v. Duck Valley Sho-Pai Tribes*, No. 10-cv-221 (D. Nev.) (Doc. 9) (tribal court sentenced petitioner "in absentia and without a hearing, and without even providing Petitioner notice that she might be subject to criminal contempt penalties"); *Star v. Massingill*, No. 10-cv-1046 (D.N.M.) (petitioner alleged he was brought before traditional tribal court without notice of the charges, informed that he was guilty of a probation violation, and summarily sentenced to 18 months' incarceration); *Calabaza v. Gleason*, No. 15-cv-1056 (D.N.M.) (petitioner alleges he was brought before traditional court without notice of the charges, summarily found guilty of theft by council headed by Governor who was in a relationship with the alleged victim, and sentenced to 364 days' incarceration). Such procedures have been described in the courts of the Northern Cheyenne Nation, of which Respondent is a member. *Morrison v. Spang*, No. 09-cv-106 (D. Mont.) (Doc. 2 at 2-3) (alleging summary *in absentia* entry of judgment and summary denial of appeal by Northern Cheyenne courts).

91. The petitioner in *Abel v. Duck Valley Sho-Pai Tribes* (see *supra* n.90) for example, managed to secure the assistance of a Federal Public Defender office only because the office happened

also be observed that while the procedures that they employ vary, traditional tribal courts are not an isolated or rare phenomenon. A report issued by the American Indian Law Center (AILC Report) noted that many tribes employ "traditional legal systems" that "operate under customary law and procedure which ordinarily is not written."[92] The report noted that 44.8 percent of the tribes responding to a survey had "a traditional system which operates along with the formal system," and that more than 90 percent of the responding tribes with both systems allowed the formal court to refer cases to the traditional system.[93]

F. Lack of resources

The tribe that prosecuted Fortino Alvarez is located on the outskirts of the sixth largest city in America and owns two golf courses, two restaurants, three casinos, a western-themed attraction, and the 500-room resort in which the New England Patriots stayed during the week leading up to last year's Superbowl.[94] Given that even such a tribe has trouble complying with ICRA, it stands to reason that remote tribes with few resources have even more difficulty doing so. And many tribes have extremely limited resources to devote to their criminal justice systems.

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to call her as a witness in a federal criminal trial unrelated to her tribal charge.

92. *AILC Report* at 21.

93. *Id.* at 22.

94. http://www.gilariver.org/index.php/enterprises; http://www.wingilariver.com/; http://www.patriots.com/news/2015/01/26/patriots-happy-trade-snow-super-bowl-sand.

The AILC Report found that tribal justice systems were "severely underfunded," with a median budget of $122,000 that, for most responding tribes, covered not only courts but also prosecutors, public defenders, and the maintenance of prisoners in jails.[95] Half of the responding tribes had no law library, and nearly half of those that had a law library reported that their libraries "do not contain the resources necessary to research the kinds of cases they handle."[96] In some cases, the only resources available were the tribe's code or "a combination of some out of date I[ndian] L[aw] R[eporter] volumes, a Black's Law Dictionary, 25 U.S.C., old training materials, and some state statutes."[97] Nearly 15 percent of the responding tribes did not record all trials, and the median reported starting salary for judges was $16.50 per hour.[98]

The financial picture may have improved for some tribes since this survey was conducted, but it is still the case that "many tribal courts remain undeveloped and often inefficient because of a lack of resources and a lack of functional judicial independence."[99] Faced with

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95. *AILC Report* at vii.

96. *Id.* at 25-26.

97. *Id.* at 26.

98. *Id.* at vii, 36.

99. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 71-72 (Winter 2013) (hereinafter Fletcher, *Indian Courts*); *see also 1991 Civil Rights Report* at 51 ("The ICRA was imposed on tribal governments by the Federal Government without accompanying support in the form of adequate funding, resources, or guidance as to how the rights guaranteed by the ICRA impact on tribal government.").

extremely limited resources, it is unreasonable to suppose that even the most well-intentioned tribes will be able to retain sufficiently qualified judges and attorneys, provide adequate research resources, or otherwise undertake the efforts required to make the complex rights enumerated in ICRA meaningful.

G. Modification or outright rejection of ICRA rights by tribal courts

Even tribal judges with adequate resources and functional independence commonly fail to meaningfully protect the rights that ICRA purports to extend to tribal criminal defendants. Whereas federal and state courts recognize their obligation to respect the rights enumerated in the Bill of Rights, and to do so in accordance with this Court's precedents, many tribes recognize no such mandate. These tribes may be grouped into three categories.

The first category includes tribes that merely decline to follow federal Bill of Rights precedent "'"jot for jot,"'"[100] and instead interpret ICRA rights in accordance with their own customs and beliefs. At least where the application of tribal custom yields results that meet or exceed the level of fairness that ICRA rights would provide defendants in state or federal court, these cases create no tension with the essential premise and purpose of ICRA.

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100. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 344 n.238 (1998)).

The second category includes tribes that stretch their sovereign prerogative further, by interpreting ICRA in ways that produce "radical departures from the meaning ascribed to the Bill of Rights by federal courts."[101] The Navajo Nation's courts, for example, have applied a Navajo common law gloss to ICRA's free speech protection, pursuant to which protected speech must be "delivered with respect and honesty" and "a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers."[102] Another tribal court held that permitting the prosecutor, rather than the judge, to make a probable cause determination following a nonwarrant arrest was consistent with due process in light of "the traditional Indian value of trust in leadership."[103] Yet another applied the traditional belief "that individual rights lie subordinate to the rights of the tribe" to uphold a judgment where reversal might have threatened the tribe's casino operations.[104] In these tribes, the meaning of ICRA rights may bear little resemblance to the corresponding constitutional rights, and may provide little or no protection against the sort of abuses against which Congress intended ICRA to protect individual tribe members.

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101. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 499 (Nov. 2000).

102. *Id.* at 493 (internal quotation marks omitted).

103. *Id.* at 516.

104. *Id.* at 537 (internal quotation marks omitted).

The third category of tribes simply refuse to recognize or enforce ICRA rights at all. Many tribal judges testifying before the Commission on Civil Rights made plain that they felt no obligation to follow ICRA's mandates,[105] and at least one tribal court has gone so far as to declare in a published opinion that its tribe was "'not bound by the provisions of the Indian Civil Rights Act.'"[106] Notably, a prominent Indian law scholar predicts more such express renunciations of ICRA.[107] For present purposes, amici do not question the legitimacy of tribal courts' belief that they are not bound by ICRA. Instead, they note only that this aspect of tribal adjudication belies any suggestion that tribal courts may be relied upon to enforce ICRA rights in a manner that meaningfully corresponds to this Court's understanding of the Bill of Rights protections they are intended to guarantee.[108]

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105. *See, e.g.*, *Rapid City Hrg.* at 272 (in the event of a conflict between ICRA and Indian law, "I would apply Indian law because that is the first law") (testimony of Cheyenne River Reservation Chief Judge Melvin Garreau); *Enf't of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights Held in Portland, Oregon Mar. 31, 1988* 71 ("we're not likely, because of our very independent natures, to just simply wholeheartedly adopt what America has done in the implementation of their Bill of Rights") (testimony of Jicarilla Apache Tribal Court Chief Judge Carey Vicenti).

106. Fletcher, *Indian Courts* at 88 (quoting *In re Batala*, 4 Am. Tribal Law 462, 468 (Hopi App. Ct. 2003)).

107. *Id.* ("[I]t would not be surprising to see more tribal court opinions rejecting the authority of Congress to enact ICRA, especially considering that the Supreme Court rejected federal enforcement of the statute in [*Santa Clara Pueblo v.*] *Martinez*.").

108. *Cf. Alvarez*, 773 F.3d at 1033 (noting that placing tribe members' capacity to vindicate their federal rights "entirely at

H. Ineffectiveness of habeas corpus remedy

When a tribe's courts fail or refuse to remedy a violation of ICRA rights, in theory the right to federal habeas corpus relief provides a remedy. In reality, ICRA's federal habeas remedy has been virtually ineffectual. Indeed, although tribal courts process anywhere from hundreds to tens of thousands of criminal cases each year,[109] a recent survey of ICRA habeas corpus cases found only *thirty* such cases challenging criminal convictions over ICRA's more than four decades on the books.[110] This absurdly small number of habeas cases is in itself grounds for suspicion that ICRA's habeas remedy is ineffective. In the year 2000 alone, federal and state inmates filed 58,257 habeas corpus petitions, or 42 petitions per 1,000 prisoners[111] – and these inmates were convicted in cases in which they were guaranteed appointed, law-trained

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the whim of their tribes" is "hardly faithful to the delicate balance between individual and group rights Congress sought to maintain when enacting ICRA") (Kozinski, J., dissenting).

109. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 412 (Spring 2004) ("The Navajo Nation courts heard 27,602 criminal cases in a recent twelve-month period."); see also *AILC Report* at 37 (tribes responding to survey reported processing average of over 530 criminal cases, excluding traffic, involving potential jail time each year).

110. Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 Wm. & Mary Bill Rts. J. 137, 147-48 (October 2015) (hereinafter Garrow, *Individualized Justice*).

111. Bureau of Justice Statistics, Office of Justice Programs, U.S. Dept. of Justice, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* 1 (2002).

counsel and law-trained judges. The notion that tribal courts, despite generally failing to provide defendants with counsel or require judges to have law degrees, have seen an astronomically smaller proportion of habeas petitions because their proceedings are essentially error-free is not plausible. The obvious conclusion is that ICRA's habeas corpus remedy is a paper tiger.

Viewed against the realities of a typical tribal inmate's situation, this is not surprising. When a tribe fails to comply with ICRA, the only recourse available to a tribal inmate, most of whom have little resources and limited education, is to invoke the aid of a federal court, generally without the assistance of counsel, pursuant to an ancient writ with a Latin name about which he likely has not received adequate (if any) notice,[112] while incarcerated in a facility which may contain little or no legal resources.[113] Amici are aware of very few instances in which tribal inmates have sought federal habeas corpus relief without the assistance of counsel.[114] In the limited instances in

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112. *See Alvarez*, 773 F.3d at 1034 (tribe's practice for giving notice of ICRA rights was to staple list of rights to criminal complaints and read list, without explanation, at beginning of each arraignment docket) (Kozinski, J., dissenting).

113. *See supra* at 26.

114. *Washington, D.C. Hrg.* at 39 ("If you have people on a reservation that cannot read and write, they do not know what their civil rights are. They don't even know where to go to say they have been violated.") (testimony of Ross O. Swimmer, Assistant Sec'y for Indian Affairs); Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 Or. L. Rev. 1, 24-26 (Spring 1998) (observing that tribe members engaged in subsistence activities, or unable to afford bail, routinely

which tribal public defenders are available, they may have the capacity to handle only a small proportion of the tribe's criminal cases,[115] and the tribes may prohibit them from practicing in federal court.[116]

Assuming that a tribal inmate manages to overcome these difficulties and make his way into federal court, his odds of convincing the court to consider the merits of his habeas claim remain vanishingly low. Although ICRA contains no exhaustion requirement, federal courts have read one into the statute,[117] and tribes have aggressively exploited this doctrine to prevent federal courts from reaching the merits of ICRA claims. Indeed, the above-mentioned survey found that just under *half* of the thirty ICRA habeas cases were dismissed for failure to exhaust tribal court remedies.[118] These purported tribal remedies, however, generally prove illusory. As

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plead guilty regardless of actual guilt to "get the case resolved as quickly as possible"); *Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights held in Flagstaff, Arizona Aug. 13-14, 1987* 36 ("It took me probably an hour and a half one morning with an interpreter to get a person who was charged with a fairly serious crime under their laws to understand that they didn't have to plead guilty[.]") (testimony of Colorado Springs attorney Ronald A. Peterson).

115. *See supra* n.56.

116. *Alvarez v. Kisto et al.*, No. 08-cv-2226 (D. Ariz.) (Doc. 40 at 6) (tribal defender explaining she was not permitted to appear in federal habeas corpus case because "it would be beyond our charter because it would be outside the reservation").

117. *Alvarez*, 773 F.3d at 1014-15.

118. Garrow, *Individualized Justice* at 148.

noted above, tribal codes and rules may be non-existent, inaccessible, unreflective of the courts' actual practices, or simply ignored.[119] This makes it difficult for tribal inmates to know what remedies may purportedly be available to them, or to make timely and effective use of them.[120] It also makes it difficult for federal courts to confidently assess tribes' assertions that tribal remedies are available. For the few tribal inmates who manage to clear the hurdles placed in the way of effective habeas corpus relief, the tribal exhaustion doctrine generally serves as the *coup de grâce.*

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In short, ICRA has failed. In the crude, but accurate, words of the former Chief Judge of the Rosebud Sioux Tribe: "you get more use out of a roll of toilet paper."[121]

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119. See *supra* at 17-19.

120. *Alvarez*, 773 F.3d 1024 ("After he was convicted and sentenced to eight years in prison, [Mr. Alvarez] was not reminded of his right to appeal; he was given no notice-of-appeal form or other guidance about how to take an appeal. He was incarcerated with no ready access to legal materials and faced a 5-day filing deadline – shorter than any I've ever heard of.") (Kozinski, J., dissenting). In the Northern Cheyenne Tribe – whose convictions of Respondent lie at the core of this case – the appeal time in criminal cases is *two* days, and briefs are due a few days later. N. Cheyenne Law and Order Code, tit. II, Ch. 3, § 2-3-2 ("In criminal cases an appeal must be requested within two days of the decision and briefs are due within ten days.") (available at http://narf.org/nill/codes/northern_cheyenne/title2.PDF) (last visited Mar. 11, 2016).

121. *Rapid City Hrg.* at 96 (testimony of former Rosebud Tribal Court Chief Judge Trudell Guerue); see also *Washington, D.C. Hrg.* at 83 ("there are massive and pervasive violations of basic

And it is important to note that while this brief provides illustrative examples from cases litigated in federal courts, these cases represent only the tip of the iceberg – primarily the small subset of instances in which records are accessible because tribal inmates have secured the assistance of attorneys. The vast majority of tribal defendants are never assisted by attorneys, and the vast majority of ICRA violations never reach the federal courthouse door.

If this Court accepts petitioner's position in this case, individuals like Mr. Alvarez and Mr. Garcia – convicted of domestic violence crimes in proceedings that they failed to understand, and that afforded them no meaningful opportunity to defend themselves – may see these convictions bootstrapped into elements of a federal crime punishable by up to ten years in prison. The Court should not accept petitioner's insistence that ICRA's guarantees ensure that such a result would be just. These proceedings, and the many more like them that routinely take place in tribal courts, are not sufficiently fair or reliable to justify their inclusion as elements of a serious federal crime.

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fundamental liberties, liberties that are guaranteed in the Indian Civil Rights Act . . . [t]he situation is shocking and it's sickening") (testimony of ACLU Mountain States Regional Counsel Stephen L. Pevar).

CONCLUSION

For the reasons set forth above, amici urge the Court to affirm the judgment below.

Respectfully submitted,

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No. 15-420

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL BRYANT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Congress of American Indians ("NCAI") is the oldest and largest organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians. It frequently participates in matters before this Court that implicate the interests of Indians and Indian tribes. As relevant here, American Indians and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work. NCAI submits this brief to explain why the Ninth Circuit's apparent distrust for tribal court convictions is ill-founded, and to emphasize the importance of deferring to Congress's judgment regarding the scope of the federal right to counsel in Indian country.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's decision rests in part on an apparent distrust for tribal court convictions. In fact, there is every reason to treat such convictions as fair and reliable. To begin with, the Indian Civil Rights Act

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are being been filed herewith.

of 1968 (ICRA) extends a plethora of procedural protections to defendants in tribal court proceedings. ICRA guarantees criminal defendants the right to due process, the right to be free of unreasonable searches and seizures, the right to request a jury trial, the right to confront witnesses, the right against self-incrimination, and the right to counsel at the defendant's own expense—just to name a few. ICRA also provides a further backstop, in the form of a habeas corpus remedy that enables defendants to vindicate their ICRA rights in federal court. And in practice, tribal courts operate under procedures that parallel their state and federal counterparts in numerous ways. For instance, although procedures differ from one court to the next, tribal courts typically are guided by written codes of procedural and substantive law; allow for appellate review of convictions; and operate independent of the tribes' executive and legislative functions. Confirming the inherent reliability of tribal court proceedings, Congress and the states defer to tribal court outcomes—including criminal convictions—for numerous purposes. There is every reason, in short, to view tribal court convictions as fair and reliable regardless of whether the tribe provided appointed counsel to indigent defendants.

II. Even beyond its misplaced concern about the reliability of tribal court convictions, the Ninth Circuit's decision improperly sets aside Congress's determination regarding how best to protect tribal court defendants' rights while also protecting victims of domestic violence on Indian reservations. In discharging its trust obligation to tribes, Congress has broad power to regulate Indian affairs—particularly in the territory

known as "Indian country." Here, notwithstanding the fact that the Bill of Rights does not apply of its own force, Congress extended a wide array of procedural rights to criminal defendants in tribal courts. But Congress made a deliberate determination *not* to extend a blanket federal-law right to appointed counsel, and enacted Section 117—a tool to combat the serious problem of domestic violence in Indian country—against the background of that determination. The Ninth Circuit's decision improperly overrides this determination: it deprives federal prosecutors of an important law enforcement tool, simply because a tribal court has not provided a defendant with protections that the applicable federal law does not require in the first instance. That choice was for Congress to make, not the Ninth Circuit.

ARGUMENT

I. Tribal Court Decisions Are Fair and Reliable.

This Court has long treated Indian sovereigns as "distinct, independent political communities" whose methods of governance are worthy of fundamental respect. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). Tribal courts, in particular, play a "vital role in tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). The Ninth Circuit's refusal to count Respondent's domestic assault convictions in the Northern Cheyenne Tribal Court as Section 117 predicate offenses rejects that understanding—and it does so "based on nothing more than a persistent distrust for tribal courts." Pet. App. 49a (O'Scannlain, J., dissent-

ing from denial of rehearing). That distrust is unwarranted.

The Ninth Circuit rested its holding on the notion that such convictions do not satisfy the "reliability concerns" that—according to the Ninth Circuit—"inhere in the Sixth Amendment right to counsel." Pet. App. 35a. Anything that "inheres in the Sixth Amendment" is beside the point here, for "the Bill of Rights does not constrain Indian tribes." *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011); *see Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Cavanaugh*, 643 F.3d 592, 595 (8th Cir. 2011). But even if reliability concerns were relevant, the Ninth Circuit's distrust of tribal court procedures is misplaced.

In passing Section 117, Congress acted with the goal of "safeguarding the lives of Indian women." Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077-78 (2006). Congress did not act on a blank canvas; rather, Section 117 relies on tribal courts' robust procedures to ensure fairness and accuracy. Indeed, federal and state courts alike routinely rely on tribal convictions for a range of purposes. Congress's decision to ensure that recidivists like Respondent face enhanced sentences under Section 117, regardless of whether their tribal court convictions were counseled, should not give this Court pause.

A. ICRA Ensures that Tribal Court Decisions Are Fair and Reliable.

Although the Bill of Rights does not itself constrain tribal court prosecutions, tribal court defendants are

protected by the Indian Civil Rights Act. Passed in 1968, ICRA gives due regard to tribal sovereignty but also safeguards the rights of criminal defendants. *See* United States Commission on Civil Rights, *American Indian Civil Rights Handbook* 11 (Mar. 1972) ("In passing the Act, Congress attempted to guarantee individual rights to reservation Indians without severely disrupting traditional tribal culture."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60-62 (1978) (noting that "a central purpose of the ICRA . . . was to secure for the American Indian the broad constitutional rights afforded to other Americans," while also highlighting Congress's intent to "promote the well-established federal policy of furthering Indian self-government" via *selective* incorporation of federal constitutional protections (internal quotation marks omitted)). In particular, ICRA gives tribal court defendants numerous rights that the Bill of Rights itself guarantees to defendants in state and federal court. Congress excluded the particular right to indigent defense counsel largely because of "the cost which the guarantee would impose on . . . already impoverished tribes." Donald J. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 590-91 (1972). But Congress ensured that a full panoply of other rights—which may better cohere with tribal traditions, resources, and court structures—protect criminal defendants.

ICRA's host of protections ensures accurate, efficient, and procedurally fair adjudications in tribal courts. In particular, ICRA:

- Provides protection against unreasonable searches and seizures. 25 U.S.C. § 1302(a)(2). Tribal courts have elaborated this right in light of this Court's jurisprudence regarding the U.S. Constitution's Fourth Amendment. *See, e.g., E. Band of Cherokee Indians v. Reed*, 3 Cher. Rep. 126, 2004 WL 5807676, at *3 (E. Cherokee Ct. Aug. 26, 2004) (applying the "plain view" rule of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)); *Nevayaktewa v. Hopi Tribe*, 1 Am. Tribal Law 306 (Hopi Ct. App. 1998).

- Protects defendants against double jeopardy. 25 U.S.C. § 1302(a)(3). In addition to receiving application by tribal courts in its own right, this provision also finds analogs in many tribal codes. *See Navajo Nation v. Kelly*, 6 Am. Tribal Law 772, 779 (Navajo 2006) (applying the Navajo Nation Bill of Rights prohibition against double jeopardy); *Metcalf v. Coquille Indian Tribal Council*, 9 Am. Tribal Law 1, 12-14 (App'x A) (Coquille Indian Tribal Ct. 2009) (Title XX Mashantucket Pequot Civil Rights Code 1-3) (prohibiting double jeopardy).

- Provides defendants with a right against self-incrimination. 25 U.S.C. § 1302(a)(4). This provision has been interpreted by tribal courts in conversation with federal courts' interpretations of the U.S. Constitution's Fifth Amendment—including this Court's elaboration of the *Miranda* doctrine. *See Fort Peck Tribes v. Bighorn*, 1 Am. Tribal Law 121, 122-23 (Fort Peck Ct. App.

1997) (interpreting and applying *California v. Beheler*, 463 U.S. 1121 (1983)).

- Ensures defendants receive access to favorable witnesses and are able to confront unfavorable witnesses, that trials are speedy and public, and that defendants have the right to obtain counsel at their own expense. 25 U.S.C. § 1302(a)(6). This provision of ICRA mirrors the Sixth Amendment in every particular other than the considered absence of a right to indigent defense counsel. *Compare id. with* U.S. Const. amend. VI. Indian tribes themselves have further ratified their support for these principles of due process by adopting them in their tribal codes and constitutions. *See, e.g.*, Const. of the Chickasaw Nation art. XIII, § 2; Rev. Const. & Bylaws of the Minn. Chippewa Tribe art. XIII, § 1; Const. of the Kickapoo Traditional Tribe of Tex. art. X, § 2(h); N. Cheyenne Tribal Code § 1-1-6.

- Provides a right to a trial by jury upon request for offenses punishable by imprisonment. 25 U.S.C. § 1302(a)(10). Just as ICRA's § 1302(a)(6) varies slightly from the U.S. Constitution's Sixth Amendment, in that defendants possess a right to counsel only at their own expense, it also varies slightly, in that defendants possess a right to trial by jury only upon affirmative request. *See Eriacho v. Ramah Dist. Court*, 6 Am. Tribal Law 624, 628 (Navajo 2005).

- Provides a generalized right to due process. 25 U.S.C. § 1302(a)(8). As with ICRA's analogs to the Sixth Amendment, this due process right is

> similar, not identical to, its counterpart in the U.S. Constitution. Tribal, state, and federal courts have "long recognized" that this right is interpreted and applied with "due regard for the historical, governmental and cultural values of an Indian tribe." *Swan v. Confederated Tribes of Grand Ronde*, No. C-14-095, 2015 WL 5432377, at *8 (Grand Ronde Tribal Ct. Sept. 1, 2015) (internal quotation marks omitted) (citing federal cases).

The components of ICRA are not haphazard. As this Court has explained, Congress carefully calibrated ICRA to "fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62. The absence of a guarantee of indigent counsel was not an oversight by Congress. Instead, it was a recognition that tribes have their own methods of ensuring that defendants receive full and fair hearings and that, in light of the safeguards that ICRA *does* extend—including the right to due process—no further guarantees are necessary. Tribal court settings, moreover, often "stress[] reconciliation" as their "main purpose," Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 Am. J. Comp. L. 509, 552 (1998). Indian tribes are tightly knit rural communities with strong kinship ties, where criminal incarceration often is a last resort. Indigent defense counsel simply is not the fulcrum upon which the reliability of tribal court decisions swings.

ICRA serves its role well, with tribal courts faithfully applying the statute to ensure that their determi-

nations are reliable and fair. Indeed, tribal courts typically interpret ICRA in accordance with federal court interpretations of concordant sections of the U.S. Constitution. *See* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 75 (2013); *see also, e.g.*, *Bailey v. Grand Traverse Band Election Bd.*, No. 2008-1031-CV-CV, 2008 WL 6196206, at *12 (Grand Traverse Trib. Jud. Aug. 8, 2008) (looking to U.S. federal and Michigan state due process case law, and holding "that tribal members are entitled to . . . essentially the same due process protections under the GTB Constitution as they are afforded under the United States or State of Michigan Constitutions."). Even those tribal courts that explicitly avow their independence from U.S. federal court interpretation of due process nevertheless treat federal decisions as highly persuasive. As the Appellate Court of the Hopi Tribe has explained, "the Hopi Tribe is not *constrained* by the due process guarantees of the United States Constitution," but Hopi courts nevertheless have the discretion to—and, as a matter of practice, do—"review federal and state law" interpreting due process to inform their formulation of explicit, precise standards on given issues. *Norris v. Hopi Tribe*, 1 Am. Tribal Law 357, 362 (Hopi Tribal Ct. App. 1998) (emphasis added). Thus, tribal courts are in dialogue with the federal courts regarding how best to safeguard the rights of criminal defendants—just as Congress has designed.

Finally, as a further assurance that tribal jurisprudence engenders reliable and fair verdicts, ICRA provides tribal defendants with access to the writ of habeas corpus. Under 25 U.S.C. § 1303, "[t]he privilege of

the writ . . . shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Thus, defendants who suffer significant constraints on their liberty may vindicate their ICRA rights in federal court. *See, e.g.*, *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004); *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010). The presence of a habeas remedy reflects Congress's attentiveness to the "balance between the dual statutory objectives" of ensuring tribal sovereignty and protecting defendants' individual rights. *Santa Clara Pueblo*, 436 U.S. at 66. That remedy enables defendants to redress certain restraints on their liberty that have gone unchecked by tribal appellate processes. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 (10th Cir. 1982). And the remedy is a robust one. It has been employed, for instance, to appeal banishment, *see Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900-01 (2d Cir. 1996), involuntary hospital commitment, *see Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 845-46 (8th Cir. 1977), and imprisonment, *see Bustamante v. Valenzuela*, 715 F. Supp. 2d 960, 962 (D. Ariz. 2010). The availability of habeas corpus as a backstop underscores the appropriateness of treating tribal court convictions as fair and reliable.

B. In Practice, Tribal Courts Are Robust and Fair Fora for Criminal Defendants.

Consistent with the guarantees of ICRA, tribal courts in general—and the Northern Cheyenne Tribal Courts in particular—advance the values of due process

and the rule of law. Indeed, the checks on tribal courts often resemble the checks on federal and state courts.

For instance, tribal courts often operate according to the separation of powers. *See, e.g.*, Chickasaw Const. art. V, § 1 ("The powers of the government of the Chickasaw Nation shall be divided into three (3) distinct departments: 1. Legislative 2. Executive 3. Judicial. No person or collection of persons, being one of those departments, shall exercise any power properly attached to either of the others."); Choctaw Const. art. V, § 1 ("The powers of the government of the Choctaw Nation shall be divided into three (3) distinct departments: Executive, Legislative and Judicial. No person or collection of persons, being one of those departments, shall exercise any power properly attached to either of the others; provided, that the exercise of such powers shall be subject to any limitations imposed by this Constitution and Federal Law."); Muscogee Const. art. VII, § 1; Seminole Const. art. XVI.

Additionally, tribal court systems commonly provide for one or more levels of appellate review. The Seminole Nation of Oklahoma's Constitution, for instance, grants its Supreme Court appellate jurisdiction, along with the power "to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law." Seminole Nation of Okla. Const. art. XVI, § 2. The Chickasaw Supreme Court similarly possesses appellate jurisdiction that is "coextensive with the Chickasaw Nation and shall extend to all cases of law and in equity." Chickasaw Const. amend. V, § 4; *See also, e.g.*, Choctaw Const. art. XIII,

§ 1; Muscogee Const. art. VII, § 1; Puyallup Judicial Code § 4.16.250. Many tribes, moreover, are served by intertribal court associations, such as the Northwest Intertribal Court System[2] or Southwest Intertribal Court of Appeals.[3] These courts establish high standards for appellate jurisprudence throughout Indian country by employing leading members of the bar to provide independent review of tribal trial court decisions. *See* Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 120 n.80 (1995) (describing the Northern Plains Intertribal Court of Appeals).

The robustness of tribal court protections should not be surprising, for tribes have no interest in error-prone courts. Indeed, tribal kinship sensibilities often ensure that courts aim to "repair the tear" to the social fabric caused by a criminal act, not to mete out draconian punishments for the sake of retribution. Cooter & Fikentscher, 46 Am. J. Comp. L. at 552. Respondent benefited from both this reparative ethos, and from the

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[2] The Northwest Intertribal Court System is a consortium of tribes in Washington State that pool resources to operate their court systems, including at the appellate level. *See Home*, Northwest Intertribal Court System, www.nics.ws (last visited Feb. 1, 2016); *Opinions*, Northwest Intertribal Court System, www.nics.ws/opinions/opinions.htm (last visited Feb. 1, 2016).

[3] The Southwest Intertribal Court of Appeals "provides an appellate court forum for tribes located in New Mexico, Arizona, southern Colorado, and west Texas." *Our Work*, American Indian Law Center, Inc., www.ailc-inc.org/SWITCA.htm (last visited Feb. 1, 2016).

due process rights that accompany it; they are more than enough to ensure that tribal court processes generate fair and reliable judgments for purposes of Section 117.

The procedures followed by the Northern Cheyenne Tribe—in whose courts Respondent was convicted—typify the protections that tribal courts commonly extend to defendants. In each of his domestic violence cases, Respondent entered a Northern Cheyenne court that was separated from the Tribe's legislative and executive functions. *See* N. Cheyenne Const. art. XI (Separation of Powers); N. Cheyenne Tribal Code tit. IA (Separation of Powers Code). The court exercising original jurisdiction was legislatively established. *See* N. Cheyenne Tribal Code § 1-2-1. Its judgments were subject to review by appellate courts and constitutional courts. *See* N. Cheyenne Tribal Code §§ 1A-4-1 to 1A-6-14. To ensure judicial independence and quality, moreover, Bryant's judges were subject to a plethora of requirements and protections: Judges in Northern Cheyenne courts are required to receive annual training, *id.* § 1A-15-1; are subject to the Northern Cheyenne Code of Judicial Conduct, *id.* § 1A-15-2; are insulated from any reduction in salary, *id.* § 1A-15-3; and must present a range of qualifications ensuring their suitability, *id.* §§ 1A-8-1 to 1A-8-13. Furthermore, the Northern Cheyenne have adopted the American Bar Association Code of Judicial Conduct into their legislative code. *See* N. Cheyenne Tribal Code tit. X.

Northern Cheyenne courts, moreover, adhere to robust and detailed codes of criminal procedure and evidence. *See* N. Cheyenne Tribal Code tits. V & VI.

Criminal defendants benefit from arrest strictures resembling those of *Miranda v. Arizona*. *See* N. Cheyenne R. Crim. Proc. C. 6. They also benefit from protections against unwarranted search and seizure. *See* N. Cheyenne R. Crim. Proc. C. 7 & 8. After arrest, they receive the protections of rules governing plea bargaining. *See* N. Cheyenne R. Crim. Proc. C. 11. Defendants like Respondent receive the opportunity to request a continuance in order to seek representation from a lay advocate or attorney trained in Northern Cheyenne procedures. And at trial, defendants benefit from a wide array of rights, including the right to know the nature and cause of one's charges, the right to confront witnesses, and the right to remain silent in lieu of self-incrimination. *See* N. Cheyenne R. Crim. Proc. C. 22. As a substantive matter, a defendant like Bryant would be prosecuted under a public legal code, *see* Northern Cheyenne Tribal Code § 7-5-10 (Domestic Abuse), and the judgment in his case would be rendered in accordance with written judicial opinions.[4]

C. Congress, State Court Systems, and This Court All Rely on Tribal Court Convictions.

In relying on uncounseled tribal court decisions as predicate offenses for Section 117, the Eighth and Tenth Circuits are in good company. Indeed, the range of courts and legislative bodies that have seen fit to credit tribal court convictions, both within and outside the domestic violence context, demonstrates how out of

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[4] While trial-level Northern Cheyenne decisions are not published, the judges keep written opinions on file for consultation in chambers.

step the Ninth Circuit is with the U.S. legal system's collective wisdom. If tribal court procedures are sufficient to render tribal court convictions reliable for this broad range of purposes, surely they are sufficient to support a prosecution under Section 117, even if uncounseled.

Numerous states give effect to tribal judicial decisions under application of the comity doctrine, which requires "deference and mutual respect" between sovereigns. *John v. Baker*, 982 P.2d 738, 762-63 (Alaska 1999) (internal quotation marks omitted). These courts—including those of Alaska, South Dakota, Montana, Oregon, and Wisconsin—view tribal court convictions as presumptively reliable. *See id.*; *Red Fox v. Hettich*, 494 N.W.2d 638, 641-42 (S.D. 1993) (quoting S.D. Codified Laws § 1-1-25); *Wippert v. Blackfeet Tribe of Blackfeet Indian Reservation*, 654 P.2d 512, 515 (Mont. 1982); *In re Marriage of Red Fox*, 542 P.2d 918, 921 (Or. Ct. App. 1975); *Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310, 314 (Wis. App. 1991). Comity, of course, requires independent attention to the presence of due process. *See, e.g.*, *John*, 982 P.2d at 763. But as the Alaska Supreme Court has put it:

> [D]ue process analysis in no way requires tribes to use procedures identical to ours in their courts. The comity analysis is not an invitation for our courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure. Instead, in deciding whether a party was denied due process, superior courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to

> recognize the practical limits experienced by smaller court systems.

Id. (footnotes omitted). Such cultural differences and practical limits inform the approach to indigent defense counsel adopted by the Northern Cheyenne and other tribes, and they do not undermine the vigorous protection of defendants' rights that tribal courts do provide.[5]

Over and above the comity provided by Alaska and other states, some states give full faith and credit to tribal court decisions. These states include Idaho, Iowa, Michigan, New Mexico, Oklahoma, and Washington. *See Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982); Iowa Code ch. 626D, subp. 5; Mich. Ct. R. 2.615; *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); Okla. Stat. tit. 12, ch. 2, app. R. 30; *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Wash. Super. Ct. Civ. R. 82.5. The credence these states give to tribal court decisions undercuts the premise of the Ninth Circuit's decision. As the Michigan Court Rules explain, for instance, so long as tribal decisions come from tribes accepting reciprocal recognition and adhering to bedrock principles of due process, then

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[5] Indeed, failing to honor those differences and limits would have the effect of treating tribal court decisions with *less* respect than judgments of foreign countries. Federal courts regularly grant such judgments extraterritorial effect without running afoul of the Constitution, merely reviewing to ensure that the judgments are not void for reasons of public policy. *See, e.g.*, Sheldon R. Shapiro, *Valid Judgment of Court of Foreign Country as Entitled to Extraterritorial Effect in Federal District Court*, 13 A.L.R. Fed. 208, § 4 (collecting cases).

> [t]he judgments decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state.

Mich. Ct. R. 2.615(A).

States show respect for tribal court decisions in other ways, too. Numerous states use prior tribal court convictions—whether or not counseled—for collateral purposes akin to the charging enhancement of Section 117. At least ten states explicitly require sex offenders convicted in tribal court to register on sex offender registries. *See* Ark. Code Ann. §§ 12-12-903(14), 12-12-905; Ga. Code Ann. § 42-1-12; Idaho Code § 18-8303; Me. Stat. Ann. tit. 34-A, § 11203; Md. Code Ann., Crim. Procedure § 11-701; Mass. Gen. Laws Ann. ch. 6, § 178C; Mich. Comp. Laws Ann. § 28.722; Nev. Rev. Stat. 179D.210; Okla. Stat. Ann. tit. 57, § 582(B); Vt. Stat. Ann. tit. 13, § 5401.[6] Such a collateral consequence, while not criminal in nature itself, is "tremendously intrusive" and can "provide the basis for a criminal prosecution" if the offender does not register. *See* Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 273-74 (2004).

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[6] Other states' registry statutes do not specify how to treat tribal convictions. *See* Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 273 n.82 (2004).

Federal law and federal courts similarly rely on tribal court criminal convictions for a range of purposes. Under 18 U.S.C. § 2265(a), states are required to enforce tribal domestic violence protection orders—a regulatory collateral consequence of domestic violence prosecutions in Indian country. Even more significantly, federal courts have seen fit to rely on tribal court records when allowing the prosecution of juveniles as adults. *See In re T.W.*, 652 F. Supp. 1440, 1443 (E.D. Wis. 1987); *United States v. Means*, 575 F. Supp. 1068, 1070-71, 1073 (D.S.D. 1983). And the federal sex offender registration scheme is triggered by tribal court convictions. *See* 42 U.S.C. § 16911(6).

That other bodies commonly defer to tribal courts should come as no surprise, in light of the protections that tribal courts provide. To deem tribal court convictions unfair or unreliable in the absence of counsel requires one to ignore the multiple layers of procedural protections afforded tribal defendants. Congress recognized the robustness of this system when it passed Section 117, and this Court should follow the Eighth and Tenth Circuits in recognizing it as well.

II. This Court Should Respect Congress's Deliberate Determinations Regarding the Scope of the Federal Right to Counsel in Indian Country.

Separate and apart from its disregard for the inherent reliability of tribal court convictions, the Ninth Circuit's decision sets aside Congress's deliberate determinations regarding tribal court defendants' right to counsel. In the exercise of its broad authority to legislate concerning Indian tribes, Congress has carefully crafted a statutory scheme—the Indian Civil Rights

Act—that extends certain procedural protections to criminal defendants, but does not confer an across-the-board right to indigent counsel. Against that background, Congress enacted Section 117 without imposing any appointed-counsel requirement for a conviction to "count." This Court should respect Congress's considered choices.

Indian tribes retain inherent sovereign authority. *See, e.g., Wheeler*, 435 U.S. at 323 (explaining that Indian tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"). As sovereigns, tribes possess the power to prosecute crimes by and against Indians within the limits of their jurisdiction. *See, e.g.*, Cohen's Handbook of Federal Indian Law § 9.04 (2012). In such prosecutions, tribes are not restrained by the Bill of Rights, for their "powers of local self government . . . existed prior to the [C]onstitution." *Talton*, 163 U.S. at 384; *see also Martinez*, 436 U.S. at 56 (noting that tribes are "separate sovereigns pre-existing the Constitution").

At the same time, however, Congress has sweeping power to enact legislation concerning tribes. As this Court put it in *Lara*: "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (internal quotation marks omitted); *see Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been

deemed a political one, not subject to be controlled by the judicial department of the government."); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962).[7]

Regulation of activities in Indian country is at the heart of Congress's power over Indian affairs. *See United States v. Celestine*, 215 U.S. 278, 284 (1909) (explaining that "to Congress, and to it alone, is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,'" and that "[f]rom an early time in the history of the government, it has exercised this power, and has also been legislating concerning Indians occupying such territory" (quoting U.S. Const., art. IV, § 3, cl. 2). Thus, Congress has made "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" applicable to Indian country. 18 U.S.C. § 1152; *see id.* § 1151 (defining "Indian country"). Consistent with that approach, Section 117 applies to domestic violence assaults within "the special maritime and territorial jurisdiction of the United States or Indian country." *Id.* § 117(a).

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[7] *See also* Enabling Act of 1889, § 4, 25 Stat. 676, 677 (stating that "the people of [the proposed states of Montana, Washington, and North and South Dakota] do agree and declare that . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States").

Taken together, tribes' sovereignty and Congress's broad authority mean that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Wheeler*, 435 U.S. at 323). And courts, in turn, must defer to Congress's decision to act—or not to act. *See, e.g., id.* at 2039 ("Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law." (quotation marks omitted)); *Martinez*, 436 U.S. at 72 ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."); *cf. United States v. Antelope*, 430 U.S. 641, 644-46 (1977)

This principle requires the Court to defer to Congress's decision not to require appointed counsel in all tribal court criminal proceedings, and likewise requires the Court to refrain from imposing an appointed-counsel requirement as a condition for tribal court convictions to "count" under Section 117. *See United States v. Ant*, 882 F.2d 1389, 1398 (9th Cir. 1989) (O'Scannlain, J., dissenting) ("Because the nature of comity between tribal courts and federal courts . . . is so sensitive and so delicately balanced, it is up to Congress, not [a court], to change the rules if they should be changed at all."). In exercising its power, Congress has extended an appointed-counsel right to tribal court defendants in certain limited circumstances—but it has never done so across the board. Rather, Congress has—over a period of nearly five decades—repeatedly declined to require the appointment of counsel, as a

matter of federal law, in all tribal court criminal proceedings.

First, in enacting ICRA, Congress gave tribal court defendants a host of procedural guarantees but declined to provide a categorical right to appointed counsel. Instead, Congress gave defendants the right to counsel at their own expense. *See* 25 U.S.C. § 1302(a); *supra* pp. 6-8.

Second, in 2010, Congress revisited the right to counsel in tribal court proceedings. Again, however, it declined to categorically require appointment of counsel. Specifically, the Tribal Law and Order Act of 2010 amended ICRA to permit tribes to impose penalties of up to three years for a single offense. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (codified at 25 U.S.C. § 1302(a), (b)). Together with this authorization of increased penalties, Congress provided additional rights to criminal defendants: *If* a tribe imposes a term of imprisonment of more than one year, it must provide the defendant with certain added protections, including indigent counsel. 25 U.S.C. § 1302(c). That right to appointed counsel for indigent defendants applies only in these limited circumstances. If the defendant's punishment is less severe, Congress determined, appointed counsel is not required as a matter of federal law.

Third, just three years ago, Congress again addressed these issues, and again declined to give all tribal court criminal defendants the right to appointed counsel. The Violence Against Women Reauthorization Act (VAWA) of 2013 "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over

all persons, including non-Indians, who commit domestic violence offenses against an American Indian or Alaska Native on tribal lands. Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (codified at 25 U.S.C. § 1304(b)(1)). VAWA of 2013 then created a "special domestic violence criminal jurisdiction" over certain non-Indians that a tribe could not otherwise exercise. 25 U.S.C. § 1304(a)(6). While thus providing tribal courts with more power, Congress granted defendants additional rights: To impose a term of imprisonment of any length under this "special domestic violence criminal jurisdiction," tribes must guarantee defendants the right to appointed counsel. 25 U.S.C. § 1304(d)(2); *see id.* § 1304(c). Again, however, Congress did not see fit to extend a federal appointed-counsel right to *all* tribal court criminal defendants—and in any event, whether to exercise jurisdiction under VAWA is completely optional for a tribe.

In repeatedly declining to extend a federal right to appointed counsel, Congress may have recognized—as Justice O'Connor has observed—that "the decision-making process[es used] by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 3 (1997). For instance, although many tribes provide indigent counsel with their own funds, others rely on trained lay counsel who are familiar with the tribal code and court procedures, and tribal judges often play a larger role in protecting the rights of the accused than is typical in Western justice systems. Regardless of its motives, however, it is clear that Congress considered the right to counsel, yet deliber-

ately decided *not* to require appointed counsel in all tribal court criminal proceedings.

Particularly against that backdrop, the Ninth Circuit's decision cannot be sustained. When Congress enacted Section 117 in 2006, it knew that federal law did not generally require tribes to provide appointed counsel. Nonetheless, Congress allowed tribal court convictions to be used as predicate offenses without imposing a separate appointed-counsel requirement. That deliberate congressional determination should not be set aside.

Leaving Congress's determination intact is particularly appropriate in these circumstances, moreover, because of the severity of the problem that it was confronting. American Indian and Alaska Native women experience domestic violence at startling rates. Sixty-one percent of American Indian and Alaska Native women have been assaulted. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 22 (2000). American Indian and Alaska Native women are 2.5 times as likely to experience violent crimes as women of other races. Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime* 4-5 (2004). On some reservations, the murder rate of Native women is 10 times the national average. Ronet Bachman, et al, *Violence Against American Indian and Alaska Native Women*

and the Criminal Justice Response: What is Known at 5 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf. One-third of Native women will be raped in their lifetimes. Attorney General's Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (2014). Presented with evidence of this problem, Congress decided to make tribal court convictions count as predicate offenses for purposes of Section 117 regardless of whether the defendant was provided with appointed counsel. The choice was Congress's to make and should not be disturbed.

None of this is to say, however, that tribes do not *want* indigent defendants to have counsel. Tribes want Congress to fully fund tribal justice systems, including indigent defense. And in certain respects, Congress has taken steps to facilitate provision of appointed counsel in tribal courts. For instance, although Legal Services Corporation grantees generally are prohibited from using federal funds to provide assistance in criminal proceedings, Congress has specifically exempted tribal court proceedings from that ban. *See* 42 U.S.C. § 2996f(b)(2). Tribes welcome that exemption, as a result of which indigent defendants often can obtain counsel even if federal law does not require as much.

Tribes also welcome the fact that the Indian Tribal Justice Act (ITJA), as amended, seeks to enhance tribal courts' capacity to provide indigent defense counsel. As relevant here, the ITJA now envisions that "base support funding" provided thereunder may be used for "the employment of tribal court personnel," including "public defenders" and "appointed defense counsel." 25

U.S.C. § 3613(b). Tribal criminal assistance grants, moreover, may be awarded to fund "defense counsel services to all defendants in tribal court criminal proceedings." *Id.* § 3663. Tribes nationwide have hailed these developments and urged Congress to appropriate the funds necessary to support indigent defense throughout Indian country, as one component of support for tribal justice systems. *See, e.g.*, Nat'l Congress of Am. Indians, Resolution #ABQ-10-116, at 2 (Nov. 2010), http://www.ncai.org/attachments/Resolution_NMmBVnhhVuXxcgFQKkRiZYqwKBRIMUwVSrETECusCxOWrTbZJiV_ABQ-10-116_rev.pdf; Nat'l Congress of Am. Indians, Resolution #SD-02-015, at 2 (Nov. 2002), http://www.ncai.org/attachments/Resolution_tXjABeaLwtfTCWRlzszAumIkNXzyVTiIkqluKdhKSvuFnFdkPOV_015.pdf. This Court should reject a rule that short-circuits this ongoing conversation between tribes and Congress and dilutes an important tool for protecting the victims of domestic violence in Indian country.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

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No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL J. BRYANT, JR.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER AND ADDITIONAL ADVOCACY ORGANIZATIONS FOR SURVIVORS OF DOMESTIC VIOLENCE AND ASSAULT IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Ninth Circuit's conclusion that the Sixth Amendment precludes the United States from exercising criminal jurisdiction over Michael J. Bryant ("Bryant" or "Respondent") based on his latest acts of domestic violence against two Native women compels the *Amici* identified herein to offer their view on the critical role 18 U.S.C. § 117(a) (the "Habitual Offender Provision") plays in ensuring the safety of Native women. As organizations committed to ending violence against Native women, *Amici* have a unique perspective on the relationship between Congress' authority over Indian affairs, the inherent sovereign authority of Tribal Governments to prosecute crimes committed against their own members, and safety for Native women and children.[1] The absence of indigent counsel in Bryant's preceding Tribal Court convictions in no way constitutionally precludes the Federal Government from subsequently exercising criminal jurisdiction over him for his latest, and hopefully his last, violent assaults perpetrated against Native women.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On January 12 and 19, 2016, counsel for Petitioner and Respondent, respectively, informed counsel for *Amici* of their consent to the filing of this *amicus* brief.

The leading signatory, the National Indigenous Women's Resource Center, Inc. ("NIWRC"), is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience working in Tribal Courts and Tribal Governments, as well as programmatic and educational work to end domestic violence against Native women.

NIWRC is joined by thirty-four additional organizations that share NIWRC's commitment to ending domestic violence, rape, sexual assault, and other forms of violence in the United States (collectively, the "NIWRC *Amici*").[2] The depth of the NIWRC *Amici*'s experience in working to end domestic violence renders them uniquely positioned to offer their views on the need to hold offenders accountable when they continue to abuse and batter women.

The NIWRC *Amici* know all too well that domestic violence is hardly ever a one-time occurrence. Instead, domestic violence is a recurring pattern of abusive and violent conduct that an offender uses to gain control over an intimate partner. When the pattern is not interrupted, the violence escalates, and the consequences often become deadly. For the NIWRC *Amici*, § 117(a) is a critical tool to disrupt a violent pattern of abuse committed by a class of offenders known to abuse and threaten the lives of Native women.

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[2] The thirty-four additional NIWRC *Amici* are identified and listed in Appendix A to this brief.

Because Bryant's attempt to undermine the efficacy of § 117(a) threatens the safety, welfare, and lives of Native women, the NIWRC *Amici* urge this Court to uphold the constitutionality of § 117(a)'s application to Bryant and overturn the decision of the Ninth Circuit.

SUMMARY OF THE ARGUMENT

Congress enacted 18 U.S.C. § 117(a) in response to a crisis. As Senator McCain noted just months before the bill's passage: "Indian women experience the highest rates of domestic violence compared to all other groups in the United States." 151 Cong. Rec. S4873, (daily ed. May 10, 2005) (statement of Sen. McCain).[3] Indeed, numerous studies indicate that Native women are more likely to be battered, raped, or sexually assaulted than any other population in the United States.[4] "Even the most conservative estimates indicate that it is an extremely serious problem."[5]

The very nature of domestic violence further compounds the extraordinarily high rates that Native women face; that is, domestic violence is a repeating

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[3] For instance, Indian women experience battery at a rate of 23.2 per 1,000, as compared with eight per 1,000 among Caucasian women. Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, §§ 902, 909, 199 Stat. 2960 (setting forth congressional findings).

[4] *See, e.g.*, Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. For Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey 2010 Summary Report* (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf

[5] Ronet Bachman et al., U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 141 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

pattern of abuse that only increases in severity over time. At its core, "domestic violence is about gaining control of another person."[6] Thus, the first incident of abuse is usually not the last, and when less abusive acts fail to establish sufficient control, a perpetrator resorts to more dangerous acts.[7] Consequently, if the law allows a perpetrator to repeatedly abuse a Native woman without the imposition of a sufficient penalty, the violence is more than likely to increase in severity. It was with recognition of this grave reality that Congress enacted the Habitual Offender Provision. *See* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain).

In addition to these extraordinarily high—and repetitive—rates of domestic violence, Congress enacted § 117(a) to address a specific void in federal law that, before 2006, prohibited the Federal Government from exercising criminal jurisdiction to prosecute many individuals who repeatedly abuse and

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[6] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see also* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007) (articulating the "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control.").

[7] *See, e.g.*, Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987) ("The first instance of violence . . . is usually short and not terribly severe . . . . Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be . . . too afraid to change the situation alone.").

batter Native women. Specifically, the Habitual Offender Provision constitutes a legislative response to three identified legal obstacles that undermined the safety of Native women.

First, in many instances—before the enactment of § 117(a)—the Federal Government could not exercise criminal jurisdiction over Native men who repeatedly abused Native women. As this Court concluded in *Crow Dog* and *Kagama*, the Federal Government is without criminal jurisdiction to prosecute Indian-on-Indian crimes unless or until Congress authorizes such jurisdiction.[8] As of 2006, Congress had only authorized federal criminal jurisdiction over "major crimes" committed by Indians against Indians, such as murder or assaults resulting in "serious bodily injury." *See* 18 U.S.C. §§ 1152-53. That is, as of 2006, the Federal Government could not exercise criminal jurisdiction to prosecute the acts of Indian-perpetrated domestic violence against Native women until such conduct resulted in *murder* or *serious bodily injury*—at which point prosecution is too late.[9]

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[8] *See Ex Parte Crow Dog*, 109 U.S. 556, 570 (1883) (the United States could not exercise jurisdiction over "the case of a crime committed in the Indian country by one Indian against the person or property of another Indian" unless so authorized by Congress); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.")

[9] In the 2013 reauthorization of VAWA, Congress lowered the standard from "serious bodily injury" to "substantial bodily injury" in the Major Crimes Act, which continues to exclude federal criminal jurisdiction over Indian-perpetrated "simple assault" or other misdemeanor level domestic violence assaults. Thanks to the enactment of § 117(a), the Federal Government can now exercise criminal jurisdiction over these crimes if they are

Second, prior to the enactment of § 117(a), numerous federal laws, including Public Law 280 ("PL-280"), limited federal prosecutors in the charges they could bring against both Indian and non-Indian offenders who repeatedly committed domestic violence against a Native woman on a reservation located within certain States.[10] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67

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committed by "repeat offenders" as defined in § 117(a). *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113); 18 U.S.C. § 117(a).

Of course, the United States has authority to exercise criminal jurisdiction over individuals who commit acts of domestic violence and "travel[] in interstate or foreign commerce." 18 U.S.C. § 2261. Domestic violence crimes committed while "[t]ravel[ing] in interstate or foreign commerce," however, are hardly ever prosecuted. *See, e.g.*, Matthew R. Durose et al., Bureau of Justice Statistics, Dep't of Justice, NCJ 207846, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, 51-52 (2005), http://www.bjs.gov/content/pub/pdf/fvs.pdf. That is, although over 2.1 million incidents of "family violence" were reported to police between 2000 and 2002 (*id.* at 2), only forty-seven individuals were convicted of interstate domestic violence during that time. *Id.* at 52. Section 2261 does not serve as a sufficient substitute for a statute creating unqualified federal criminal jurisdiction over individuals who repeatedly beat and abuse Native women.

[10] Congress enacted PL-280 in 1953, effectively "shifting federal criminal jurisdiction over Indian Country to [select] states regardless of tribal consent." M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 674 (2011). Since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1635-37 (1998).

Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, & 28 U.S.C. § 1360). As of 2005, the federal criminal jurisdiction created in the Major Crimes Act was—and continues to be—deferred to certain State Governments as a result of PL-280 and other PL-280 like statutes, meaning that for assaults committed against Native women in those six States, the Federal Government simply cannot intervene or press charges. *See* 18 U.S.C. § 1162.[11]

In other similarly-situated jurisdictions, the then-existing federal assault statute allowed the Federal Government to charge only a six-month misdemeanor (for simple assault or assaults by striking, beating or wounding) or a ten-year felony if the assault resulted in "serious bodily injury." 18 U.S.C. § 113(a)(4)-(6) (incorporated through 18 U.S.C. § 1152). The six-month misdemeanor is often insufficient for serious, repeat domestic violence offenders who have not yet caused "serious" bodily injury. *See id.* § 113 (a)(4)-(5).

Third, when Congress enacted the Habitual Offender provision in 2006, federal law limited the ability of Tribal Governments to impose penalties sufficient to protect their citizens from habitual offenders. That is, the Indian Civil Rights Act ("ICRA") precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense, including domestic

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[11] "States with Indian Country lands that do *not* appear to presently be affected directly or indirectly by P.L. 280 or P.L. 280-like statutes are Alabama, Arizona, Louisiana, Michigan, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, and Wyoming." Leonhard, *supra*, at 692 (emphasis added); *see also id.* at 694 (listing other States "[s]imilarly [a]ffected" as those States that exercise jurisdiction under PL-280).

violence. 25 U.S.C. § 1302(7).[12] As is made clear in the case of Bryant, sentences of less than one year are often insufficient and fail to deter offenders from continuing to abuse Native women.

Taken together, this legal framework left no sovereign with a felony-level punishment that could be imposed in a case where a repeat domestic violence offender committed multiple assaults against a Native woman that resulted in something less than "serious" or "substantial" bodily injury. That is, prior to the enactment of the Habitual Offender Provision, perpetrators who abused Native women would "escape felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain). In response, Congress drafted the Habitual Offender Provision and created federal criminal jurisdiction over "habitual offender[s]" who commit acts of "[d]omestic assault." 18 U.S.C. §117(a). The statute identifies "habitual offender[s]" as those individuals with "at least 2 separate prior [convictions] in Federal, State, or Indian tribal court." *Id.*

The Habitual Offender Provision therefore addresses all three of the aforementioned jurisdictional and sentencing gaps by creating federal criminal jurisdiction over a class of offenders who pose a serious threat to the safety and welfare of Native women. The

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[12] In 2010, Congress passed, and the President signed into law, the Tribal Law and Order Act ("TLOA"). Tribal Law and Order Act of 2010, Pub. L.No. 111-211, Tit. II, 124 Stat. 2261. The TLOA amended the Indian Civil Rights Act to provide that Tribal Courts may impose sentences of up to three years of imprisonment for any one offense if certain requirements are met. *Id.* at § 234, 124 Stat. 2279-80 (codified at 25 U.S.C. § 1302). To date, very few Tribes have been able to implement the full enhanced sentencing authority conditionally granted in TLOA.

creation of such jurisdiction falls well within the ambit of Congress' exclusive authority over Indian affairs, and is, therefore, constitutional. *See United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as '*plenary* and *exclusive*'") (internal quotation marks and citations omitted) (emphasis added); *see also United States v. Kagama*, 118 U.S. 375, 383 (1886) (Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States.").

Moreover, a clear application of this Court's decisions in *Nichols v. United States*, 511 U.S. 738 (1994), and *Lewis v. United States*, 445 U.S. 55 (1980), reveals that §117(a)'s creation of federal criminal jurisdiction over a habitual offender's latest acts of domestic violence contains no constitutional infirmity—despite the fact that the offender's prior convictions giving rise to federal jurisdiction may have been uncounseled. As the Ninth Circuit, the Eighth Circuit, the Tenth Circuit, and Respondent all agree, uncounseled Tribal Court convictions for domestic violence do not violate the United States Constitution.[13] Furthermore, § 117(a) penalizes only the latest

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[13] *See United States v. Bryant*, 769 F.3d 671, 675 (9th Cir. 2014) (stating that "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings"); *United States v. Cavanaugh*, 643 F.3d 592, 595-96 (8th Cir. 2011) ("[T]he Constitution does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies[,] . . . . [and] the Indian Civil Rights Act only requires the appointment of counsel for indigent criminal defendants in tribal court for prosecutions that result in a term of incarceration greater than one year."); *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (stating that

offense of domestic violence, and it does so in a federal criminal proceeding that affords the defendant assistance of counsel, in compliance with the Sixth Amendment. The Habitual Offender Provision, therefore, passes constitutional muster under both *Nichols* and *Lewis*.

To be sure, the present case carries significant consequences for Native women—in particular, for the women Bryant has continued to abuse. The unchallenged record establishes that Bryant habitually abuses women. Over the past seventeen years, he has hit, strangled, kneed, kicked, and bit Native women. *See* U.S. Suppl. Br. 10, 9th Cir., ECF No. 33 (detailing numerous convictions starting in 1998). In 1999, he strangled his girlfriend at the time and smashed a beer bottle on her head. U.S. Pet. for a Writ of Cert. 4. In 2007, he punched and kneed a girlfriend in the face. *Id.* More recently, in February 2011, he grabbed his then-girlfriend, pulled her hair, repeatedly punched her in the face and chest, repeatedly kicked her, bit her fingers, and threatened her. J.A. 37-38.

In May of that same year, Bryant violently assaulted another woman who was living with him at the time. One morning, when he awoke and could not find his truck keys, he grabbed his victim with both hands and strangled her until she almost passed out. J.A. 37-38; Crim. Compl. 3, D. Mont., ECF No. 1. These stories are only a small part of the picture. The full record identifies many more victims; Bryant has been convicted of committing crimes of domestic violence in January 1998, July 1998, March 2002,

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"because the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment"); Resp't Br. in Opp'n to Pet. for Writ of Cert. 21 ("The Sixth Amendment right to counsel 'd[oes] not obtain' in tribal court proceedings." (citation omitted)).

September 2002, July 2003, and February 2005, in addition to his most recent 2011 conviction in the United States District Court, District of Montana. Crim. Compl. 5, D. Mont., ECF No. 1; U.S. Suppl. Br. 11, 9th Cir., ECF No. 33.

Bryant does not deny that he abuses women. He has "more than 100 tribal-court convictions for various criminal offenses, including several misdemeanor convictions for domestic assault." U.S. Suppl. Br. 10, 9th Cir., ECF No. 33; Pet. Br. 7, 55 (citing Presentence Investigation Report (PSR) ¶ 81). In an interview related to the underlying charges in this case, he admitted that he physically assaulted his February 2011 victim at least five to six times during the year and a half they lived together. Crim. Compl. 4, D. Mont., ECF No. 1. He further admitted that he assaulted his May 2011 victim three times in a little over two months. *Id.* Bryant made these admissions in a federal court proceeding where he was provided counsel.

Despite this continuing pattern of violence and abuse, the Northern Cheyenne Tribal Court was never able to sentence Bryant to more than one year in prison—or as Judge Owens noted, "what someone who 'borrows' a neighbor's People magazine from the mailbox on two separate occasions could face." U.S. Pet. for a Writ of Cert. 40a (Owens, J., dissenting from denial of reh'g *en banc*).

The extraordinary magnitude of violence perpetrated against Native women today constitutes one of the greatest threats to the integrity and continued existence of Tribal Nations and their people. Nothing in the Constitution precludes Congress from creating federal criminal jurisdiction over individuals that pose a serious and significant threat to Native women;

instead, Congress' trust duties and obligations compel congressional action. To conclude otherwise would call into question the legitimacy of a twenty-first century legal framework that precludes Tribal Governments from fully and effectively protecting their citizens from the criminals who repeatedly abuse them.

ARGUMENT

I. Section 117(a) is a Constitutionally Permissible Means by Which Congress Ensures the Safety of Native Women

A. The Crisis of Violence Against Native Women Demands Federal Action

Congress' power to authorize federal criminal jurisdiction over a class of individuals identified by Tribal Governments as having repeatedly abused and beaten Native women sits well within constitutional bounds. Respondent's attacks on the constitutionality of § 117(a)'s application to him, therefore, do not survive scrutiny.

1. Native Women Face Rates of Domestic Violence Higher than Any Other U.S. Population

> *We as Native women are faced with our own mortality every day, from the sexual assaults, stalking, domestic violence, human trafficking and murder, the rates of violence against us far exceed all other groups in this country. My question has been and continues to be: When will the courts of the United States uphold the ability of the U.S. Congress and our own sovereign Indian Nations to protect us?*
>
> **Survivor Lisa Brunner (White Earth Nation)**

In enacting § 117(a), Congress noted that "Indian women experience the highest rates of domestic violence compared to all other groups in the United States." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Senator McCain explained the congressional purpose behind the new tribal provisions as follows:

> [O]ne out of every three Indian women are victims of sexual assault; [] from 1979 to 1992, homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and [] 75 percent of those deaths were committed by a family member or acquaintance. These are startling statistics that require our close examination and a better understanding of how to prevent and respond to domestic violence in Indian Country.

151 Cong. Rec. S4873 (statement Sen. McCain); *see also Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11 (2005) ("I note the very heavy incidence of battering of Indian women. Almost one out of three Indian women will be raped. Indian women are shown to be three times as likely as non-Natives to be battered.") (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary). The crisis that Native women face cannot be understated; "on some reservations, Native women are murdered at more than ten times the national average."[14] Indeed, these

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[14] *Stand Against Violence and Empower Native Women Act: Hearing on S. 1763 Before the S. Comm. On Indian Affairs*, 112th Cong. 10 (2011) (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States), http://www.indian.senate.gov/sites/default/files/upload/files/TranscriptRecord-2.pdf (citing a

dire statistics led Congress to create not only §117(a), but also in 2005, Congress added an entirely separate title to address the epidemic of violence against Native women: Title IX Safety for Indian Women. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, Tit. IX, 119 Stat. 3077 (2006) ("VAWA 2005") (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.).

Numerous national studies support these congressional findings and establish that Native women experience some of the highest rates of domestic violence in the United States. When Congress passed VAWA 2005, the Department of Justice reported that sixty-one percent of American Indian and Alaska Native women (or three out of five) had been assaulted in their lifetimes, exceeding the rates of assault for every other group in the United States.[15] Since that time, multiple studies have drawn similar conclusions. For example, in 2010, the Centers for Disease Control and Prevention released a report that concluded that forty-six percent of American Indian and Alaska Native women have experienced rape, physical violence and/or stalking by an intimate partner in their lifetime.[16] In 2014, a literature review of published studies on violence against Native women concluded

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National Institute of Justice-funded analysis of death certificates).

[15] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* 22 (2000), https://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

[16] Black, *supra*, at 3.

that "violence against women affects the majority of American Indian and Alaska Native women."[17]

National data, however, only allow for a generalized understanding of this pervasive problem. Localized studies paint an even grimmer reality. In one sample from a tribal community in the Southwest, ninety-one percent of community members reported they had experienced intimate partner violence in their lifetime.[18] In another local study focused on rural Tribes in California, study participants reported a domestic violence prevalence ranging from eighty to ninety percent.[19]

These local studies provide ample justification for the congressional action taken to enact § 117(a).

2. Domestic Violence Perpetrators are Likely to Reoffend

The Habitual Offender Provision is particularly important because it addresses repeat offenders. Domestic violence notoriously involves a high rate of recidivism. When Congress passed § 117(a), the Department of Justice noted that 65.5% of domestic

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[17] Katherine J. Sapra et al., *Family and Partner Interpersonal Violence among American Indians/Alaska Natives*, 1 Injury Epidemiology 7 (2014), www.injepijournal.com/content/pdf/2197-1714-1-7.pdf.

[18] Robert W. Robin et al., *Intimate Violence in a Southwestern American Indian Tribal Community*, 4 Cultural Diversity and Mental Health 335 (1998).

[19] Loring Jones, *The Distinctive Characteristics and Needs of Domestic Violence Victims in a Native American Community*, 23 J. Fam. Violence 113, 115 (2008).

violence victims reported being victimized multiple times by the same partner.[20]

More recent studies confirm the general principle that domestic violence is not a one-time event. For example, a ten-year study of a sample of domestic violence offenders reported that approximately half of domestic violence offenders were re-arrested during the study period.[21] A 2012 Bureau of Justice Statistics report found that "most female victims of intimate partner violence were previously victimized by the same offender, including seventy-seven percent of females ages 18-24, seventy-six percent of females ages 25-34, and eighty-one percent of females ages 35-49."[22] It is important to note that by the time a victim reports domestic violence to police, she has typically suffered "multiple assaults or related victimizations."[23] And as a survivor experiences repeated victimizations over time, the "time intervals between successive victimizations decrease."[24]

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[20] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence* 39 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[21] Tara N. Richards et al., *A 10-Year Analysis of Rearrests Among a Cohort of Domestic Violence Offenders*, 29 Violence and Victims 887, 897 (2014).

[22] Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 239203, *Intimate Partner Violence, 1993-2010*, 4 (2012), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf.

[23] Andrew R. Klein, Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ 225722, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 6 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

[24] Marie Mele, *The Time Course of Repeat Intimate Partner Violence*, 24 J. Fam. Violence 619, 620 (2009).

Prosecution is an important tactic to address the repetitive nature of domestic violence. For example, a 2009 National Institute of Justice Report indicated that "prosecution deters domestic violence if it adequately addresses abuser risk by imposing appropriately intrusive sentences."[25] Section 117(a), therefore, serves as the critical intervention needed to increase the likelihood that victims may find relief from a long-standing crisis in their lives—especially since federal law prohibits the majority of Tribal Courts from imposing sufficiently intrusive sentences to deter future assaults.

Congress, therefore, reasoned that without the Habitual Offender Provision, perpetrators could continue to repeatedly abuse Native women and "escape felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain). Given the staggering rates of repeated violence against Native women, Congress' considered judgment that § 117(a) was necessary to protect Native women is more than reasonable—and without a doubt—fully constitutional.

3. Violence Escalates Over Time

Furthermore, the repetitive nature of domestic violence is incredibly serious because perpetrators often increase the severity of violence with each repeated act of abuse. *See United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014) ("Domestic violence often escalates in severity over time. . . . "). Thus, when no intervention occurs, a victim typically experiences an

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[25] Klein, *supra*, at 47.

ever-increasing severity of violence.[26] Moreover, even when victims are able to escape the relationship, the likelihood of additional violence increases.[27] The risk of lethal violence is particularly salient; spouses and partners commit a significant portion (thirty percent) of all homicides of women.[28] For Native women, this number is much higher; as Congress noted in 2005, "Homicide was the third leading cause of death of Indian females between the ages of 15 to 34 and . . . *75 percent of those deaths were committed by a family member or acquaintance.*" 51 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain) (emphasis added).

This dynamic makes it even more important for federal prosecutors to intervene under § 117(a) following a minimum of two domestic violence convictions, as studies indicate that domestic violence escalates over time. It was in response to this dangerous reality that Congress created the Habitual Offender Provision.

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[26] Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 W. St. U. L. Rev. 173, 184-185 (2007).

[27] Ruth E. Fleury et al., *When Ending the Relationship Doesn't End the Violence*, 6 Violence Against Women 1363, 1364 (2000).

[28] Lawrence Greenfeld et al., Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ-167237, *Violence by Intimates* 6 (1998), http://bjs.gov/content/pub/pdf/vi.pdf. In fact, physical violence is the "primary risk factor for intimate partner femicide." Jacquelyn C. Campbell et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 American J. of Public Health 1089, 1091 (2003).

B. Congress Created Federal Criminal Jurisdiction over Habitual Offenders to Close the Jurisdictional and Sentencing Gaps that Previously Left Many Native Women with No Protection

Deciphering which sovereign may exercise criminal jurisdiction over a domestic violence crime committed against a Native woman is rife with complications—complications that impose significant barriers to ensuring the safety of Native women. Congress recognized the consequences of this framework when it created the Habitual Offender Provision. As Senator McCain noted two months before the bill's passage, "due to the unique status of Indian tribes," Tribal Governments face numerous legal "obstacles" in working to protect Native women from domestic violence and homicide. 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain; *see also Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 449 (2005) (testimony of the National Coalition Against Domestic Violence) (noting that the "current jurisdictional limitations have only exacerbated the disproportionate rates of violence, [and thus] it is essential that the Senate address these loopholes.") (Written Testimony on the Violence Against Women Act of 2005 on behalf of The National Coalition Against Domestic Violence). Congress, therefore, enacted the Habitual Offender Provision to address this maze of criminal jurisdiction, specifically, the gaps that left Native women without protection.

To be sure, the legal obstacles Congress sought to address in 2005 have been accumulating for more than a hundred years, beginning in 1883, with this Court's

interpretation of the General Crimes Act. The backdrop for § 117(a) originates in *Ex Parte Crow Dog*, wherein this Court interpreted § 2146 of the General Crimes Act as exempting from federal criminal jurisdiction any "crime committed in the Indian country by one Indian against the person or property of another Indian." 109 U.S. 556, 570 (1883) (citing Act of Feb. 18, 1875, c. 80, sec. 1, § 2146, 18 Stat. 318 (codified as amended at 18 U.S.C. § 1152)). In *Crow Dog*, the United States had charged Crow Dog with the murder of another Indian. *See id.* at 557. However, this Court concluded that the exercise of federal criminal jurisdiction would not be permissible absent "a clear expression of the intention of congress" that the Court was "not [] able to find." *Id.* at 572. Because Congress had exempted Indian-on-Indian crime from federal criminal jurisdiction, only Congress could act to restore it. *See id.*

In response to *Crow Dog*, Congress enacted the Major Crimes Act in 1885, authorizing federal criminal jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person. 18 U.S.C. §§ 1152-53; *see also* S. Rep. No. 90-841, at 12 (1967) ("Congress enacted the 'Major Crimes Act' in 1885" in response to "an early Supreme Court case, *Ex parte Crow Dog*, 109 U.S. 556 (1883)").

One year later, in 1886, this Court reviewed the congressional establishment of federal criminal jurisdiction over Indian-on-Indian crime and found the enactment of such jurisdiction to be well "within the competency of congress." *United States v. Kagama*,

118 U.S. 375, 383 (1886). According to the Court in *Kagama*, when legislating with regards to Indian affairs, Congress has the constitutional authority to "define[] a crime committed [] and ma[k]e it punishable in the courts of the United States." *Id.* Deemed a constitutional exercise of congressional power in *Kagama*, the Major Crimes Act affords the Federal Government criminal jurisdiction over certain felony assaults committed by Indians in Indian country. *See* 18 U.S.C. § 1153.

As of 2005, however, "the Major Crimes Act [did] not include provisions to provide Federal prosecutors the ability to prosecute domestic violence assaults unless they rise to the level of serious bodily injury or death." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain).[29] Consequently, Congress enacted § 117(a) "[t]o close existing gaps in Federal criminal laws . . . [that fail] to address incidents of domestic violence" perpetrated against Native women. *Id.* at S4874. That is, the Habitual Offender Provision is premised on the precept that repeat offenders should be subject to federal criminal prosecution *before* the violence escalates to the level of permanent, substantial injury.

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[29] In the 2013 re-authorization of VAWA, Congress lowered the standard in the Major Crimes Act from "serious bodily injury" to "substantial bodily injury." *See* note 9, *supra*. The term "substantial bodily injury" means "bodily injury which involves—(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1). Section 117(a), therefore, signals Congress' intent that Native women not be required to wait until their body is disfigured or they lose the function of a bodily member and/or organ to witness their perpetrator's federal prosecution.

Congress also enacted § 117(a) to close jurisdictional gaps in relation to non-Indian offenders who abuse Native women. Section 117 grants the Federal Government jurisdiction over recidivist Indian and non-Indian offenders in what are commonly referred to as PL-280 States, as well as those States otherwise similarly situated. *See* note 11, *supra*. Public Law 280 grants six States[30] criminal jurisdiction over "offenses committed by or against Indians" in Indian country. 18 U.S.C. § 1162. At the same time, it revokes the Federal Government's jurisdiction over crimes committed under the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. 18 U.S.C. § 1162(c). This includes assault and domestic violence committed by non-Indians and Indians against Native women and children. 18 U.S.C. §§ 1152-1153; 18 U.S.C. § 113 (by incorporation). Therefore, prior to the enactment of § 117(a), the Federal Government could not intervene and prosecute domestic violence against a Native woman in these States, even if the violence was committed by a non-Indian.[31]

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[30] The six States are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, subject to a few exceptions. 18 U.S.C. § 1162. The Metlakatla Indian community on Annette Islands, Alaska can exercise concurrent jurisdiction, and the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon are excluded. *see id.* Minnesota retroceded authority over Bois Forte in 1975. Boise Forte Indian Reservation - Nett Lake; Acceptance of Retrocession of Juridsiction, 40 Fed. Reg. 4026 (Jan. 15, 1975)).

[31] Although prosecutions under 18 § U.S.C. 2261 are certainly possible, they are not practical, and in practice, hardly ever happen—as establishing that the defendant "travels in interstate or foreign commerce" is a burden many prosecutors determine they cannot, or simply fail, to meet. *See* note 9, *supra*.

Finally, Congress created federal criminal jurisdiction over repeat offenders based on its conclusion that the one-year sentence limitation imposed in the Indian Civil Rights Act ("ICRA") permitted repeat offenders to continue their abuse against Native women without receiving anything more than a slap on the wrist. At the time of § 117(a)'s enactment, ICRA precluded Tribal Courts from imposing a prison term greater than one year for any criminal offense. 25 U.S.C. § 1302(7).[32]

As this Court concluded in *Crow Dog* and *Kagama*, the Federal Government has no inherent criminal jurisdiction to prosecute Indian-on-Indian crimes—unless Congress authorizes such jurisdiction pursuant to its constitutional authority over Indian affairs; likewise, the Federal Government's power to prosecute crimes involving both Indians and non-Indians is generally constrained by the General Crimes Act unless Congress acts to expand it. *See Kagama*, 118 U.S. at 383; *Crow Dog*, 109 U.S. at 572. Here, Congress has done just that—and accordingly, § 117(a) falls well "within the competency of congress." *Kagama*, 118 U.S. at 383.

C. Section 117(a) Constitutes a Constitutional Exercise of Congress' Authority over Indian Affairs

Section 117(a), therefore, constitutes a constitutional exercise of Congress' power over Indian affairs because it supports, and does not undermine, the inherent right of Indian Nations to protect their citizens. In exercising its authority, Congress must take care not to intrude on what this Court has

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[32] In 2010, Congress passed, and the President signed, the Tribal Law and Order Act into law. *See* note 12, *supra*.

recognized as a Tribe's "inherent power necessary to [sustain] tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). The Habitual Offender Provision more than meets this challenge, as it builds on "respect both for tribal sovereignty itself and for the plenary authority of Congress. . . ." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (internal citation and quotation marks omitted). Accordingly, the congressional enactment of § 117(a) is constitutional.

"Indian nations ha[ve] always been considered as distinct, independent political communities . . . ." *Talton v. Mayes*, 163 U.S. 376, 383 (1896) (citation and quotation marks omitted). Despite a regrettable history of policies that sought to exterminate Tribal Governments and their citizens, Indian Nations have survived and remain a "separate people, with the power of regulating their internal and social relations. . . ." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886). One of the attributes of sovereignty that Indian Nations maintain today is the "power to prescribe and enforce internal criminal laws. . . ." *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

This Court has described the authority of Tribes to prosecute and punish their own members as "'inherent.'" *United States v. Lara*, 541 U.S. 193, 204 (2004) (quoting *Wheeler*, 435 U.S. at 322–23). In discussing the historical context of tribal prosecutions, the *Wheeler* Court explained that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U.S. at 322-23 (internal citation omitted); *see also Lara*, 541 U.S. at 204

(affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

The inherent authority of Indian Nations to proscribe their own criminal laws for crimes committed on their lands, therefore, is not constrained by either the Bill of Rights or the Fourteenth Amendment, as neither of their own force apply to Indian Nations. *See Talton*, 163 U.S. at 384; *see also Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *see also Lara*, 541 U.S. at 205 ("[T]he Constitution does not dictate the metes and bounds of tribal autonomy. . . ."). Rather than being subject to the United States Constitution, Tribal Governments are instead subject to their own Constitutions, and as such, their inherent sovereignty is constrained only by "the supreme legislative authority of the United States." *Talton*, 163 U.S. at 384. Accordingly, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal citations and quotation marks omitted).

Indeed, the constitutionality of § 117(a)'s creation of federal criminal jurisdiction over repeat offenders cannot be construed separate and apart from ICRA, 25 U.S.C. § 1302. In enacting ICRA, "Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57 (citing 25 U.S.C. § 1302). That is, although "ICRA requires tribes to accord all

persons within their jurisdiction enumerated rights akin to the federal Bill of Rights" (*Kelsey v. Pope*, Case No. 14-1537, 2016 WL 51243, at *11 (6th Cir. 2016)), Congress elected not to incorporate the Bill of Rights as a whole and instead "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62.

In order to "avoid[] undue or precipitous interference in the affairs of the Indian people," Congress declined to require Tribal Courts to provide for the "appointment of counsel for indigents in criminal cases." *Santa Clara Pueblo*, 436 U.S. at 63. Congress' election to exclude the appointment of counsel in ICRA's requirements, therefore, constitutes a constitutional exercise of Congress' exclusive power over Indian affairs—one with which this Court should not interfere. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (Congress' authority over Indian affairs "has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (the Court has "consistently described [Congress's authority] as *plenary and exclusive* to legislate [with] respect to Indian tribes") (internal citations and quotation marks omitted) (emphasis added).

Because "Congress' authority over Indian matters is extraordinarily broad, the role of *courts* in adjusting relations between and among tribes and their members [is] correspondingly restrained." *Santa Clara Pueblo*, 436 U.S. at 72 (emphasis added). In this instance, Congress determined that the extraordinarily high rates of domestic violence against Native

women required the creation of federal criminal jurisdiction over individuals identified to be "repeat" or "habitual offenders." In crafting this newfound federal criminal jurisdiction, Congress considered (1) the domestic violence crisis that Native women and their Tribal Nations face; (2) the contemporaneous legal framework that precluded Tribal Nations and the Federal Government from effectively and fully prosecuting individuals who repeatedly beat and abuse Native women; and (3) the unique trust duties and obligations that compelled Congress to assist Tribal Governments in ensuring the safety of Native women. *See generally* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Such considerations are more than rational, and well-within the scope of Congress' constitutional power over Indian affairs.

D. Congress Determined That Trust Duties and Obligations Compelled the Creation of Federal Criminal Jurisdiction Over Repeat Offenders

The Federal Government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women" compelled Congress to establish federal criminal jurisdiction over repeat offenders. VAWA 2005, § 901. Congress' considered judgment in the execution of the Federal Government's trust responsibility should not be disturbed. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011).

As a result of the numerous treaties signed with Indian Nations to acquire the majority of the lands that constitute the United States today, the Federal Government "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation*

v. United States, 316 U.S. 286, 296-97 (1942). Since this Court's decision in *Seminole Nation*, these "moral obligations" grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). This Court has reaffirmed that management of this trust relationship is assigned to Congress. *See Jicarilla Apache Nation*, 131 S. Ct. at 2323 ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

As *Jicarilla Apache Nation* further recognized, this trust relationship vests Congress with the constitutional authority to legislate over Indian affairs. *See id.* at 2323-24 (noting that Congress has the authority to "define[] . . . the trust relationship between the United States and the Indian tribes"); *see also Blackfeather v. United States*, 190 U.S. 368, 374 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize. . . .").

In enacting § 117(a), Congress reviewed numerous "national studies indicat[ing] that Indian women experience domestic and sexual assaults at a far greater rate than other groups of women in the national population." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. McCain). Congress further considered "the unique legal relationship of the United States to Indian tribes," and concluded that the Government's "trust responsibility to assist tribal governments in safeguarding the lives of Indian women" compelled the creation of federal criminal jurisdiction over individuals that Tribal Governments

have identified as repeat offenders. VAWA 2005, § 901. Respondent's attempt to eviscerate the application of § 117(a) to repeat offenders such as himself, therefore, threatens not only the safety of Native women, but the integrity and ability of Congress to fully effectuate its trust responsibility to Indian Nations and their citizens.

II. Section 117(a)'s Federal Criminal Jurisdiction over Indian Habitual Offenders Comports with This Court's Decisions in *Nichols* and *Lewis*

Furthermore, § 117(a) fits well within the constitutional framework this Court articulated in *Nichols* and *Lewis* concerning the use of prior, uncounseled convictions in subsequent federal proceedings. When understood in its proper and full context, it is clear that § 117(a) extends no new or additional punishment for any prior domestic violence convictions. Any sentence imposed pursuant to § 117(a) constitutes a punishment for the perpetrator's latest—and hopefully final—act of domestic violence. The fact that individuals are identified as threatening the safety and welfare of Native women in a Tribal Court proceeding without the provision of indigent counsel in no way constitutionally precludes Congress from authorizing the exercise of criminal jurisdiction over them when they subsequently act on the identified threat and do in fact, once again, abuse a Native woman.

In *Nichols*, this Court determined that the Constitution does not prohibit a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in determining his sentence for a subsequent offense. *See Nichols v. United States*, 511 U.S. 738, 747 (1994). The Court based its decision on

two findings. *See id.* at 747-49. *First*, the *Nichols* Court reasoned that the use of the prior conviction in the subsequent sentencing was constitutionally sound because the prior conviction, despite being uncounseled, did not itself violate the Constitution. *See id.* at 749 (concluding that "because no prison term was imposed" the prior "uncounseled misdemeanor conviction" was "valid under *Scott*" and did not violate the Constitution) (citing *Scott v. Illinois*, 440 U.S. 367 (1979)). *Second*, the Court reasoned that the use of a constitutionally compliant prior conviction for enhancement purposes in a later, separate conviction did not violate the Constitution because "[e]nhancement statutes, ...or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." *Id.* at 757. Taken together, these two factors led the Court to conclude that the reliance on a prior uncounseled misdemeanor for enhancement/recidivist purposes in no way violates the Constitution because the misdemeanor conviction itself did not violate the Constitution, and furthermore, the recidivist "repeat-offender law[] penaliz[ed] only the last offense committed by the defendant." *Id.*

Therefore, § 117(a)'s Habitual Offender Provision fully complies with the constitutional framework the Court articulated in *Nichols*. Like the prior conviction at issue in *Nichols*, Respondent's prior uncounseled convictions in Tribal Court in no way violate the Constitution. *See United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) ("Use of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment . . . *because the Sixth Amendment was never violated in the first instance.*") (emphasis added) (internal citation omitted). That is, the Bill of Rights and the Fourteenth Amendment do

not of their own force apply to Indian Nations, as Indian Nations are separate sovereigns governed by their own separate Constitutions. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896). Because "it is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings," (*United States v. Cavanaugh*, 643 F.3d 592, 601 (8th Cir. 2011)), the absence of a constitutional violation in Respondent's prior domestic violence convictions precludes his reliance on those proceedings to establish a constitutional infirmity in subsequent proceedings.

Even if Bryant could establish a constitutional violation inherent in his prior convictions, he remains unable to demonstrate that the sentence the United States District Court imposed in any way "change[s] the penalty imposed for the earlier conviction[s]." *Nichols*, 511 U.S. at 747. Like the enhancement statute at issue in *Nichols*, § 117(a) does not punish repeat offenders for their earlier convictions. Instead, Bryant's current prosecution is strictly for his most recent acts, specifically: on February 28, 2011, when he grabbed C.L.O. and dragged her off their bed onto the floor and then proceeded to "pull[] [her] hair, repeatedly punch[] and kick[] her," and "bit[e] her fingers"; and on May 28, 2011, when he choked a woman he was living with, D.E., "until she almost passed out." J.A. 37-38. Because he pled guilty to the aforementioned acts of domestic violence, Bryant was sentenced to forty-six months imprisonment—for those acts—and those acts alone. *See* J. 2-3, D. Mont., ECF No. 34.

Respondent has offered no argument to support the conclusion that a sentence of forty-six months is not commensurate with the violent assaults he committed

against two separate women in February and May of 2011. Accordingly, when considered in the context of this Court's decision in *Nichols*, it is clear that § 117(a)'s Habitual Offender Provision is a "repeat-offender law [that] penalize[es] only the last offense committed by the defendant." *Nichols*, 511 U.S. at 747. This Court's decision in *Nichols* alone affirms the constitutionality of § 117(a)'s reliance on Tribal Court convictions to identify a class of repeat offenders who, because of the threat they impose to the safety of Native women, should be subject to federal criminal jurisdiction for any subsequent acts of violence they commit.

Section 117(a) also passes constitutional muster under *Lewis*. In *Lewis*, this Court considered whether a defendant's prior uncounseled conviction "may constitute the predicate for a subsequent conviction under § 1202(a)(1) . . . of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. § 1202(a)(1)." *Lewis v. United States*, 445 U.S. 55, 56 (1980). Ultimately, the Court concluded that the "[u]se of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction," did not violate the Constitution's Sixth Amendment. *Id.* at 67. The Court based its decision on the conclusion that "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." *Id.* Likewise, Congress' judgment that an individual convicted of multiple counts of domestic violence is among a class of persons who pose a significant threat to Native women and thus should be prosecuted under federal criminal jurisdiction for any subsequent acts of violence is, like the congressional

judgment this Court considered in *Lewis*, entirely rational.

Indeed, as Judge Watford explained below, it would be "illogical" to conclude that, in contrast to this Court's decision in *Lewis*, "the 'mere fact' of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence." Pet. App. 19a. As Judge Watford further noted, the exercise of federal criminal jurisdiction pursuant to § 117(a) does not "imping[e] upon anyone's rights" nor does the statute enhance penalties for "domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Id.*

Because Respondent's prior convictions did not violate the Sixth Amendment, and because those prior convictions simply constitute the basis for federal criminal jurisdiction over his *subsequent* acts of domestic violence, § 117(a)'s application to Respondent's recent criminal conduct in 2011 fully complies with the United States Constitution. To conclude otherwise would abrogate Congress' considered judgment in the exercise of its power over Indian affairs, and furthermore, would serve to insulate repeat offenders who continue to abuse Native women.

III. The Failure to Reverse the Ninth Circuit Would Have Devastating Consequences for Native Women

A finding that Congress cannot rely on Tribal Court convictions to establish federal criminal jurisdiction over a class of individuals who pose a serious threat to Native women would seriously undermine Congress' ability to effectuate its authority over Indian affairs. Likewise, the conclusion that the Constitution precludes the application of § 117(a) to violent repeat

offenders like Bryant would place a significant number of Native women in grave danger.

Nothing in the United States Constitution condones the perpetuation of a legal framework that leaves Native women without sufficient legal protection to deter repeat offenders. As a result of "the unique legal relationship of the United States to Indian tribes," the Federal Government has a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." VAWA 2005, § 901. This Court should reverse the decision of the Ninth Circuit and affirm the ability of Congress to create federal criminal jurisdiction over individuals who repeatedly beat, batter, and abuse Native women.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully Submitted,

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APPENDIX

APPENDIX

STATEMENTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of Petitioner.

American Indians Against Abuse ("AIAA") is a Wisconsin not-for-profit incorporated in 1991. AAIA is a statewide sexual assault and domestic violence tribal coalition serving Wisconsin's eleven Tribes and member programs by providing education, support, and technical assistance to enhance and strengthen the response to victims of domestic violence, sexual assault, dating violence, and stalking. AIAA's trainings, community awareness, and collaborative events are designed to be reflective of and have relevance to our local, regional, and nationwide indigenous people and culture.

The **Avellaka Program** is a La Jolla Band of Luiseno Indians not-for-profit organization incorporated in 2009. The Avellaka Program is dedicated to educating and organizing for social change, upholding the Tribe's authority as a sovereign Indian Nation to protect its women citizens and create the laws, policies, protocols, and advocacy services addressing violence against Native women on the La Jolla Reservation.

The **Battered Women's Justice Project** ("BWJP") is a Minnesota not-for-profit organization incorporated in 2015 (http://www.bwjp.org). The BWJP is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence ("IPV"). The BWJP promotes systemic change within the civil and criminal justice

systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of IPV on women and children and to fashion safe outcomes that hold batterers accountable.

Domestic and Sexual Violence Services is a Montana not-for-profit organization incorporated in 1999 (www.dsvsmontana.org). Domestic and Sexual Violence Services' mission is to serve individuals, families, and communities impacted by physical, sexual and emotional abuse, and to promote healthy, equitable, violence-free relationships. Domestic and Sexual Violence Services uses a three-pronged approach: providing guidance and resources to individuals experiencing violence; CCR training and support to systems professionals to provide comprehensive services and hold perpetrators accountable; and violence prevention education through the Power Up, Speak Out! program.

The **Domestic Violence Legal Empowerment and Appeals Project** ("DV LEAP") is a Washington, D.C. not-for-profit organization incorporated in 2003 (http://www.dvleap.org). DV LEAP was founded by one of the nation's leading domestic violence lawyers and law professors to advance safety and justice for

abused women and children through appellate litigation. Despite numerous legislative and policy reforms designed to protect victims of domestic violence, many abused women and children are deprived of legal protections and rights in court. The appellate review process is the only way to correct these trial court errors, but appeals are rare because they are costly and require scarce appellate and domestic violence expertise. DVLEAP responds to this vital need through *pro bono* appellate representation as well as training and strategic assistance to lawyers and courts.

The **First Nations Women's Alliance** is a North Dakota not-for-profit organization incorporated in 2008 (http://www.nativewoman.org/). It is the mission of the First Nations Women's Alliance to strengthen tribal communities by creating a forum for leaders to come together to address the issues of domestic violence and sexual assault. The Alliance is committed to ending all forms of violence by providing culturally relevant services and resources and facilitating the provision of those services by others in our communities.

Futures Without Violence ("FUTURES") is a national not-for-profit organization incorporated in 1984 (www.futureswithoutviolence.org). For more than thirty years, FUTURES has been providing groundbreaking programs, policies, and campaigns that empower individuals and organizations working to end violence against women and children around the world. Providing leadership from offices in San Francisco, Washington D.C. and Boston, FUTURES has established a state-of-the-art Center for Leadership and Action in the Presidio of San Francisco to

foster ongoing dialogue about gender-based violence and child abuse.

Globalmother is a Tanzania not-for-profit organization incorporated in 2011 (www.globalmother.org). The purpose of Globalmother is to provide protection for mothers suffering from physical, water, and food insecurity.

The **Hopi-Tewa Women's Coalition to End Abuse** is an Arizona not-for-profit organization incorporated in 2009. The Coalition is a tribal domestic violence and sexual assault coalition located on the Hopi Reservation in northeast Arizona. The coalition provides training, technical assistance, policy development, advocacy support and education to the Tribal Government, program partners and community. The Coalition's mission is to advocate for a coordinated and effective response system that creates a safety net towards building healthy communities, while embracing the strength of Hopi cultural values and traditions.

The **Lower Elwha Klallam Tribe Family Advocacy Program** ("FAP") is a Lower Elwha Klallam Tribe not-for-profit organization incorporated in 2000 (http://www.elwha.org/tribalprograms/family advocacy.html). FAP operates within the Tribal Government of the Lower Elwha Klallam Tribe, a federally recognized Indian Tribe located in the Olympic Peninsula of the State of Washington. The mission of FAP is to ensure victim safety and autonomy through advocacy and community awareness. Using reservation based advocacy, FAP delivers direct services such as crisis intervention, individual advocacy (legal; medical; financial), community referrals, accessing safehouses/shelters, relocation and/or transitional housing to victims/survivors of

domestic violence, dating violence, sexual violence, and stalking. FAP also empowers the Elwha Tribal community by facilitating community awareness and prevention activities.

Mending the Sacred Hoop is a Minnesota not-for-profit organization incorporated in 2006 (www.mshoop.org). Mending the Sacred Hoop works from a social change perspective to end violence against Native women and children while restoring the safety, sovereignty, and sacredness of Native women. Mending the Sacred Hoop is committed to strengthening the voice and vision of Native peoples through grassroots organizing, as well as restoring the leadership of Native women in addressing and ending domestic and sexual violence.

The **Monument Quilt** is a Maryland not-for-profit organization incorporated in 2013 (www.themonumentquilt.org). The Monument Quilt is an on-going collection of stories from survivors of rape and abuse. Written, stitched, and painted onto red fabric, our stories are sewn together to create and demand public space to heal. The Quilt builds a new culture where survivors are publicly supported, rather than publicly shamed.

The **National Coalition Against Domestic Violence** ("NCADV") is a Colorado not-for-profit organization incorporated in 1978 (www.ncadv.org). The vision of NCADV is to create a culture where domestic violence is not tolerated; and where society empowers victims and survivors, and holds abusers accountable. NCADV's mission is to be the voice of victims and survivors. NCADV is the catalyst for changing society to have zero tolerance for domestic violence. NCADV does this by effecting public policy, increasing understanding of the impact of domestic

violence, and providing programs and education that drive that change.

National Coalition of Anti-Violence Programs ("NCAVP") is a New York not-for-profit organization incorporated in 1995 (www.ncavp.org). NCAVP works to end all forms of violence within and against lesbian, gay, bisexual, transgender, queer, and HIV-affected communities. NCAVP is a national coalition of local member programs and affiliate organizations who create systemic and social change. We strive to increase power, safety, and resources through data analysis, policy advocacy, education, and technical assistance.

The **National Domestic Violence Hotline** is a Texas not-for-profit organization incorporated in 1996 (www.thehotline.org). Every day, 24/7/365, the National Domestic Violence Hotline provides confidential, compassionate, and practical help to the more than 400,000 people who contact the Hotline for help with domestic and dating violence issues every year via phone, chat, and text. With a database of more than 5,000 providers and resources in the United States, Puerto Rico, the U.S. Virgin Islands, and Guam, the Hotline and its youth component (www.Loveisrespect.org), provide confidential conversations and crucial information to help guide survivors to appropriate programs and safety. Since 1996, more than 3.7 million people have received help from The Hotline.

The **National Indian Justice Center** ("NIJC") is a California not-for-profit incorporated in 1983 (www.nijc.org). The NIJC is an Indian-owned and operated not-for-profit corporation with principal offices in Santa Rosa, California. The NIJC was established in 1983 through the collective efforts of the

National American Indian Court Judges Association, the American Indian Lawyer Training Program, and the Bureau of Indian Affairs in order to establish an independent national resource for Native communities and Tribal Governments. The goals of NIJC are to design and deliver legal education, research, and technical assistance programs which seek to improve the quality of life for Native communities and the administration of justice in Indian country.

The **National Resource Center on Domestic Violence** ("NRCDV") is a Pennsylvania not-for-profit organization incorporated in 1993 (www.nrcdv.org). The mission of the NRCDV is to strengthen and transform efforts to end domestic violence. Since 1993, the NRCDV has provided comprehensive and individualized technical assistance, training and resource development related to domestic violence intervention and prevention, community education and organizing, and public policy and systems advocacy. The NRCDV strives to be a trusted national leader and sustainable organization, renowned for innovation, multidisciplinary approaches, and a commitment to ensuring that policy, practice, and research is grounded in and guided by the voices and experiences of domestic violence survivors and advocates.

The **Native Alliance Against Violence** is an Oklahoma not-for-profit organization incorporated in 2009 (www.oklahomanaav.org). The Native Alliance Against Violence is Oklahoma's only tribal domestic and sexual violence coalition. Through the Spirit of respect and cooperation, the Native Alliance Against Violence strives to unify tribal service programs throughout Oklahoma by providing culturally appropriate technical assistance, training and support

to eliminate domestic violence, sexual violence, dating violence, stalking, and sex trafficking to restore balance and safety for Native communities.

The **Native Women's Coalition** is an Idaho not-for-profit organization incorporated in 2009. The Coalition provides awareness through education, training and technical assistance to Native and non-Native service providers to stop domestic violence and sexual assault against Native women and children, both on reservation and in rural and urban off-reservation communities. The Coalition believes it is essential that all providers understand the unique need for the delivery of culturally appropriate services to victims, especially child victims.

The **Native Women's Society of the Great Plains** is a South Dakota not-for-profit organization incorporated in 2008 (www.nativewomenssociety.org). The Coalition's mission is to promote the safety of Native women. The Coalition is comprised of organizations that provide shelter and services to Native women experiencing violence in their homelands.

Restoring Ancestral Winds, Inc. ("RAW") is a Utah a 501 (c)(3) non-profit organization incorporated in 2013 (www.restoringancestralwinds.org). The mission of RAW is to support healing in our indigenous communities. RAW will advocate for healthy relationships; educate communities on issues surrounding stalking, domestic, sexual, dating and family violence; collaborate with Great Basin Region community members and stakeholders; and honor and strengthen traditional values with all our relations.

Sacred Spirits First Nations Coalition ("Sacred Spirits") is a Minnesota not-for-profit corporation incorporated in 2001. Sacred Spirits is a non-

profit that has been addressing domestic violence and sexual assault of Native American and Alaska Native Women for 14 years. Sacred Spirits' mission is to reclaim the sacred spirits of women, men, and their families for the next seven generations by healing the effects of historical trauma through culturally competent practices utilizing traditional Anishinaabe values and beliefs. Sacred Spirits is dedicated to unifying the safety response on behalf of Native women, men and their families being victimized by sexual and domestic violence. Sacred Spirits, in its mission, vision, and strategic plan, keeps a priority to reduce or eliminate domestic violence, dating violence, sexual assault in the White Earth area or surrounding area.

The **South Dakota Coalition Ending Domestic & Sexual Violence** is a South Dakota not-for-profit organization incorporated in 1978 (http://sdcedsv.org). The Coalition's mission is to provide assistance to the local domestic violence programs in South Dakota in order to keep women and their children safe.

The **Southwest Indigenous Women's Coalition** ("SWIWC") is an Arizona not-for-profit organization incorporated in 2006 (www.swiwc.org). SWIWC is located in Mesa, Arizona, and works to end domestic and sexual violence against Native women. Through training, technical assistance, policy development, and outreach education, SWIWC helps to build the capacity of Tribes in Arizona to better address and respond to the violence occurring in their communities.

The **Strong Hearted Native Women's Coalition, Inc.** is a California not-for-profit organization incorporated in 2006 (www.strongheartedwomen.org). Strong Hearted Native Women's Coalition was founded in 2005 to bring awareness against Sexual

Assault, Domestic Violence, Youth Violence, and Stalking in North County of the San Diego County. Native women from the Indian reservations of Rincon, Pauma, Mesa Grande, Santa Ysabel, La Jolla, San Pasqual, Los Coyotes, Pala, and Inaja/Cosmit make-up the Coalition's membership. Over the years, the Coalition has expanded to include Tribes from all of Southern California as well as other Tribes throughout the state of California. The purpose of the Coalition is to enhance the capacity of survivors, advocates, Indian women's organizations, and victim services providers to form non-profit, non-governmental tribal domestic violence and sexual assault coalitions to advance the goal of ending violence against American Indian and Alaskan Native women. The overarching goal of the Strong Hearted Native Women's Coalition program is to increase the amount of dedication to improving systemic and community responses to victims; to raise awareness, educate; and to provide technical assistance, training, and supportive services for victims of sexual assault, domestic violence, dating violence, stalking, and human/sex trafficking, including addressing the cultural and unique barriers facing Native women. By honoring our women ancestors, the Strong Hearted Native Women's Coalition advocates for women and their families and promotes safety and a traditional non-violent lifestyle. The Coalition works towards empowering women with the tools for independence, courage, and a strong direction to make healthy life choices for herself, her children, and family.

The **Tribal Law and Policy Institute** is a California not-for-profit organization incorporated in 1996 (www.home.tlpi.org). The Tribal Law and Policy Institute is a 100% Native American operated non-profit, organized to design and deliver education,

research, training, and technical assistance programs which promote the enhancement of justice in Indian Country and the health, well-being, and culture of Native peoples.

Uniting Three Fires Against Violence ("UTFAV") is a Michigan not-for-profit organization incorporated in 2009 (www.unitingthreefiresagainst violence.org). UTFAV is a statewide tribal coalition against domestic and sexual violence. UTFAV's mission is "[t]o support Michigan Tribes in promoting the social change necessary to address the disproportionate rates of violence impacting our communities." UTFAV envisions: (1) empowered Native American survivors with access to essential and culturally appropriate services throughout the State of Michigan; (2) tribal communities that have access to the resources necessary to provide the identified services: and (3) tribal, state and federal responses that are guided by culturally appropriate and trauma informed practices.

The **Wabanaki Women's Coalition** ("WWC") is a Maine not-for-profit organization incorporated in 2013 (www.wabanakiwomenscoalition.org). The mission of the WWC is to increase the capacity of tribal communities to respond to domestic and sexual violence and influence tribal, national, and regional systems to increase awareness, safety, justice, and healing for all our relations. The WWC's vision is to guide the evolution of systems and policies that reflect the WWC's Wabanaki voice on behalf of survivors of domestic and sexual violence. The vision is also to create a technical resource center that affirms Wabanaki cultural values and tribal sovereignty, and empowers tribal service providers to serve, educate and influence their communities in an effective and

uniform way. The WWC also seeks to be recognized as the informed resource for issues on Wabanaki survivors of domestic and sexual violence.

Washington State Coalition Against Domestic Violence ("WSCADV") is a Washington not-for-profit organization incorporated in 1990 (www.wscadv.org). WSCADV is the leading voice for ending domestic violence in Washington State. WSCADV mobilizes member programs and allies to end domestic violence through advocacy and action for social change. WSCADV recognizes the sovereignty of Tribes and the critical role Tribal Courts and Tribal Governments have in ending domestic and sexual violence against Native women.

The **Washington State Native American Coalition Against Domestic Violence & Sexual Assault** is a Washington not-for-profit organization incorporated in 2005 (www.womenspirit.net). The Coalition envisions a Nation where Native women live safely and where all citizens embrace these core values as they strive towards a collective vision of safety. The Coalition believes in the empowerment of survivors, restoration of spiritual and traditional practices, human rights advocacy, restorative justice, and promoting healing from trauma.

Wiconi Wawokiya, Inc., ("Wiconi Wawokiya") is a South Dakota not-for-profit organization incorporated in 1987 (www.wiconiwawokiya.org). Wiconi Wawokiya's (Helping Families) mission is to reduce violence in the homes, workplace, schools, and the communities in which we live. Wiconi Wawokiya strives to provide safety to the victims of domestic violence, dating violence, stalking, adult and child sexual assault victims. Wiconi Wawokiya empowers those who are oppressed by providing information,

encouragement and support. Wiconi Wawokiya works to promote respect for individual differences and diversities. Wiconi Wawokiya educates society on the dynamics of domestic violence and sexual assault in intimate relationships, stalking, rape, human trafficking, and child sexual assault.

Wind River SAFESTARS is a non-profit organization of first responders serving the Eastern Shoshone and Northern Arapaho community in Wyoming. Trained and certified in 2014, SAFESTARS are the first line of protection for a victim of sexual violence and domestic violence in our communities on the Wind River Reservation.

Women of Color Network, Inc., is a Pennsylvania not-for-profit organization incorporated in 2009 (www.wocninc.org). The Women of Color Network, Inc. is a national grassroots organization amplifying the leadership and voices of women of color and tribal women seeking to end oppression and violence across all communities.

Women's Crisis Support Team is a Siletz Tribe not-for-profit organization incorporated in 1983 (www.wcs tjoco.org). Women's Crisis Support Team is dedicated to breaking the cycle of DV & SA through intervention, prevention and safe shelter.

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